71 Box 24 - JGR/Exclusionary Rule (1) - Roberts, John G.: Files
SERIES I: Subject File

Excl/us. Rpt

THE WHITE HOUSE

WASHINGTON

January 4, 1983

MEMORANDUM FOR T. KENNETH CRIBB, JR.
ASSISTANT COUNSELLOR TO THE PRESIDENT

FROM: JOHN G. ROBERTS JGR
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: New Study on Exclusionary Rule

I am attaching a recent story and editorial on the new NIJ exclusionary rule study, which I mentioned at the last Saturday Group meeting at Bruce Fein's. The study shows that the exclusionary rule resulted in the release of 29% of felony drug arrestees in Los Angeles in one year -- a far cry from the highly misleading 0.4% figure usually bandied about. This study should be highly useful in the campaign to amend or abolish the exclusionary rule.

Attachment

Rule errors voided 29% of L.A. drug cases, study shows

By Susan Christian
Herald Examiner staff writer

Nearly 4,000 people arrested in Los Angeles on felony drug charges last year were freed without standing trial because of violations of complex search and seizure rules, according to a study released yesterday.

The survey, by the National Institute of Justice in Washington, D.C., found that 29 percent of the 11,965 felony drug arrests by the Los Angeles Police Department in 1981 were rejected at the initial case review because police made mistakes in seizing evidence. Results for Los Angeles County were similar, showing that 32.5 percent of felony drug arrests were thrown out.

LAPD spokesman Commander William Booth said of the report, "It's certainly a sad commentary that in one out of three cases where you've got the narcotics suspect in one hand and his narcotics in the other hand, someone says, 'Oh, we have to let him go because somebody stumbled along the way and some technicality wasn't followed.'"

The report's summary states that the study was "initiated to provide current information on the impact of the exclusionary rule on state felony prosecutions."

Ron Bowers, a deputy district attorney who helped obtain statistics for the study, said the survey was done in California because of the state's sophisticated data processing system. "The figures are easier to come by here," he said.

The exclusionary rule originated from a 1914 Supreme Court decision that "evidence obtained in violation of Fourth Amendment safeguards against improper search and seizure would not be admissible in federal prosecutions."

"The exclusionary rule was rather simple when it started out," Bowers said. "However, over the years there have been thousands of court decisions that have come down, and each of those decisions spells out a different rule regarding when an officer has probable cause to investigate.

"They're not really rules in the sense that they are in a rule book," Bowers continued. "The police officer is expected to know each one of those appellate decisions, and what we're seeing is that *no* one can know all of them."

The report indicated that the percentage of narcotics arrests rejected on the grounds of improper search was highly disproportionate to the percentage of total felony arrests rejected on the same grounds. Only 4.8 percent statewide and 11.7 percent in Los Angeles County of *all* charges — narcotics, assaults, burglaries, murders, rapes — were dismissed because of search and seizure problems, according to the study.

Bowers said the Los Angeles County sample included more than 2,000 felony cases.

Robert Schirn, head of the Organized Crime and Narcotics Division of the district attorney's office, pointed out that a higher percentage of drug-related arrests than others are thrown out because "virtually every narcotics arrest is the result of search and seizure" — while other felony cases don't always involve evidence obtained by search and seizure.

"And in other cases, if evidence obtained through search and seizure is thrown out, there is other evidence — such as witnesses — to proceed with."

"This (search and seizure laws) is something I've been upset about for a long time," said Schirn. "The officer is expected to make a split-second judgment about a law that attorneys and judges don't even understand. The officer is put on trial in narcotics cases instead of the criminal," Schirn said.

"There should be a good faith exception to the exclusionary rule," he added. "I think well over 90 percent of all officers conduct searches in good faith — unaware they are breaking some rule."

District attorney's spokesman Al Albergate said the survey's results were no surprise to him. "(District Attorney John) Van de Kamp has been working for reform of the exclusionary rule for a long time," he said.

LOS ANGELES HERALD EXAMINER

Francis L. Dale/Publisher
Mary Agnes Dolan/Editor

Stanley W. Cloud/Executive editor
John P. Lindsay/Managing editor
Sheena Paterson/Associate editor
Joseph Farah/Executive news editor
Bernee D.L. Strom/Assistant to the editor

N. S. Hayden/President
Theodore P. Grassi/General manager
David W. Feldman/Director of sales

Leo J. Kelly/Circulation director
Ray Willis/Production director
John Reid/Director of finance
Milo Sutton/Director of marketing services
Robert N. Schoenbacher/Advertising manager
Lee Beauregard/Classified advertising manager

Cops and the law

A new study questions the 'exclusionary rule'

A new study by the National Institute of Justice indicates that the "exclusionary rule," banning illegally obtained evidence from court, has frustrated law enforcement more than had earlier been documented. According to the study, the rule resulted in the release of one out of three people arrested in Los Angeles last year on felony drug charges. Of those released, most had serious records and apparently returned to their criminal ways.

Such statistics are disturbing — and surprising. We have defended the rule, in part because there was little evidence that it hampered law enforcement. A 1978 federal study showed, on the contrary, that search-and-seizure errors accounted for just 0.4 percent of all federal cases rejected for trial, and for only 1 percent of overturned convictions. But the new study suggests that the federal experience is not typical. In one L.A. County office alone last year, the rejection rate was 14.6 percent.

It would be wrong to leap from the study's statistics to the conclusion that the exclusionary rule should be eliminated. We don't know, for instance, whether the local search-and-seizure errors were "good-faith" slip-ups, or knowing violations of someone's constitutional rights. Still, stricter evidentiary rules have unquestionably made the job of the police more difficult, which, in itself, is neither good nor bad. But if the exclusionary rule has, indeed, unfairly tilted the balance, changes are in order.

The suggestions so far aren't very promising, however. We still think the "Victims' Bill of Rights," which all but threw out the exclusionary rule, is no answer. The "good faith" exception (allowing illegally seized evidence, provided police thought they were obeying the law at the time) seems to offer too great a loophole.

More ideas are needed. As a curb to illegal or overzealous police behavior, the exclusionary rule has merit. The challenge lies in preserving the protection it provides to all citizens, while giving the police a fighting chance. ■

exclusionary rule

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

IMMIGRATION AND NATURALIZATION SERVICE *v.* LOPEZ-MENDOZA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

gued April 16, 1984—Decided July 5, 1984 No. 83–491. Argued April 16, 1984—Decided July 5, 1984

izens were ordered deported by an Imm Respondent Mexican citizens were ordered deported by an Immigration Judge. Respondent Lopez-Mendoza unsuccessfully objected to being tation hearing following his allegedly unla summoned to the deportation hearing following his allegedly unlawful arrest by an Immigration and Naturalization Service (INS) agent, but he did not object to the receipt in evidence of his admission, after the arrest, of illegal entry into this country. Respondent Sandoval-Sanchez, who also admitted his illegal entry after being arrested by an INS agent, unsuccessfully objected to the evidence of his admission offered at the deportation proceeding, contending that it should have been suppressed as the fruit of an unlawful arrest. The Board of Immigration Appeals (BIA) affirmed the deportation orders. The Court of Appeals reversed respondent Sandoval-Sanchez' deportation order, holding that his detention by INS agents violated the Fourth Amendment, that his admission of illegal entry was the product of this detention, and that the exclusionary rule barred its use in a deportation proceeding. The court vacated respondent Lopez-Mendoza's deportation order and remanded his case to the BIA to determine whether the Fourth Amendment had been violated in the course of his arrest.

Held:

1. A deportation proceeding is a purely civil action to determine a person's eligibility to remain in this country. The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws. Consistent with the civil nature of a deportation proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing. Pp. 5–6.

2. The "body" or identity of a defendant in a criminal or civil proceeding is never itself suppressible as the fruit of an unlawful arrest, even if

Syllabus

it is conceded that an unlawful arrest, search, or interrogation occurred. On this basis alone, the Court of Appeals' decision as to respondent Lopez-Mendoza must be reversed, since he objected only to being summoned to his deportation hearing after an allegedly unlawful arrest and did not object to the evidence offered against him. The mere fact of an illegal arrest has no bearing on a subsequent deportation hearing. Pp. 6–7.

3. The exclusionary rule does not apply in a deportation proceeding; hence, the rule does not apply so as to require that respondent Sandoval-Sanchez' admission of illegal entry after his allegedly unlawful arrest be excluded from evidence at his deportation hearing. Under the balancing test applied in *United States* v. *Janis*, 428 U. S. 433, whereby the likely social benefits of excluding unlawfully obtained evidence are weighed against the likely costs, the balance comes out against applying the exclusionary rule in civil deportation proceedings. Several factors significantly reduce the likely deterrent value of the rule in such proceedings. First, regardless of how the arrest of an illegal alien is effected, deportation will still be possible when evidence not derived directly from the arrest is sufficient to support deportation. Second, based on statistics indicating that over 97.7 percent of illegal aliens agree to voluntary deportation without a formal hearing, every INS agent knows that it is unlikely that any particular arrestee will end up challenging the lawfulness of his arrest in a formal deportation hearing. Third, the INS has its own comprehensive scheme for deterring Fourth Amendment violations by its agents. And finally, the deterrent value of the exclusionary rule in deportation proceedings is undermined by the availability of alternative remedies for INS practices that might violate Fourth Amendment rights. As to the social costs of applying the exclusionary rule in deportation proceedings, they would be high. In particular, the application of the rule in cases such as respondent Sandoval-Sanchez' would compel the courts to release from custody persons who would then immediately resume their commission of a crime through their continuing, unlawful presence in this country, and would unduly complicate the INS's deliberately simple deportation hearing system. Pp. 7–17.

705 F. 2d 1059, reversed.

O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, and IV, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined, and an opinion with respect to Part V, in which BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., filed dissenting opinions.

SUPREME COURT OF THE UNITED STATES

No. 83–491

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER *v.* ADAN LOPEZ–MENDOZA ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[July 5, 1984]

[July 5, 1984]

JUSTICE O'CONNOR delivered the opinion of the Court.†

This litigation requires us to decide whether an admission of unlawful presence in this country made subsequent to an allegedly unlawful arrest must be excluded as evidence in a civil deportation hearing. We hold that the exclusionary rule need not be applied in such a proceeding.

I

Respondents Adan Lopez–Mendoza and Elias Sandoval–Sanchez, both citizens of Mexico, were summoned to separate deportation proceedings in California and Washington, and both were ordered deported. They challenged the regularity of those proceedings on grounds related to the lawfulness of their respective arrests by officials of the Immigration and Naturalization Service (INS). On administrative appeal the Board of Immigration Appeals (BIA), an agency of the Department of Justice, affirmed the deportation orders.

The Court of Appeals for the Ninth Circuit, sitting en banc, reversed Sandoval's deportation order and vacated and remanded Lopez–Mendoza's deportation order. 705 F. 2d 1059 (1983). It ruled that Sandoval's admission of his illegal presence in this country was the fruit of an unlawful arrest, and that the exclusionary rule applied in a deportation pro-

†THE CHIEF JUSTICE joins all but Part V of this opinion.

ceeding. Lopez-Mendoza's deportation order was vacated and his case remanded to the BIA to determine whether the Fourth Amendment had been violated in the course of his arrest. We granted certiorari, 464 U. S. 1984.

A

Respondent Lopez-Mendoza was arrested in 1976 by INS agents at his place of employment, a transmission repair shop in San Mateo, Cal. Responding to a tip, INS investigators arrived at the shop shortly before 8 a. m. The agents had not sought a warrant to search the premises or to arrest any of its occupants. The proprietor of the shop firmly refused to allow the agents to interview his employees during working hours. Nevertheless, while one agent engaged the proprietor in conversation another entered the shop and approached Lopez-Mendoza. In response to the agent's questioning, Lopez-Mendoza gave his name and indicated that he was from Mexico with no close family ties in the United States. The agent then placed him under arrest. Lopez-Mendoza underwent further questioning at INS offices, where he admitted he was born in Mexico, was still a citizen of Mexico, and had entered this country without inspection by immigration authorities. Based on his answers, the agents prepared a "Record of Deportable Alien" (Form I-213), and an affidavit which Lopez-Mendoza executed, admitting his Mexican nationality and his illegal entry into this country.

A hearing was held before an Immigration Judge. Lopez-Mendoza's counsel moved to terminate the proceeding on the ground that Lopez-Mendoza had been arrested illegally. The judge ruled that the legality of the arrest was not relevant to the deportation proceeding and therefore declined to rule on the legality of Lopez-Mendoza's arrest. *Matter of Lopez-Mendoza*, No. A22 452 208 (INS, Dec. 21, 1977), reprinted in App. Pet. for Cert. 97a. The Form I-213 and the affidavit executed by Lopez-Mendoza were received into evi-

dence without objection from Lopez–Mendoza. On the basis of this evidence the Immigration Judge found Lopez–Mendoza deportable. Lopez–Mendoza was granted the option of voluntary departure.

The BIA dismissed Lopez–Mendoza's appeal. It noted that "[t]he mere fact of an illegal arrest has no bearing on a subsequent deportation proceeding," *In re Lopez–Mendoza*, No. A22 452 208 (BIA, Sept. 19, 1979), reprinted in App. Pet. for Cert. 100a, 102a, and observed that Lopez–Mendoza had not objected to the admission into evidence of Form I–213 and the affidavit he had executed. *Id.*, at 103a. The BIA also noted that the exclusionary rule is not applied to redress the injury to the privacy of the search victim, and that the BIA had previously concluded that application of the rule in deportation proceedings to deter unlawful INS conduct was inappropriate. *Matter of Sandoval*, 17 I. & N. Dec. 70 (BIA 1979).

The Court of Appeals vacated the order of deportation and remanded for a determination whether Lopez–Mendoza's Fourth Amendment rights had been violated when he was arrested.

B

Respondent Sandoval–Sanchez (who is not the same individual who was involved in *Matter of Sandoval*, *supra*) was arrested in 1977 at his place of employment, a potato processing plant in Pasco, Wash. INS Agent Bower and other officers went to the plant, with the permission of its personnel manager, to check for illegal aliens. During a change in shift-officers stationed themselves at the exits while Bower and a uniformed Border Patrol agent entered the plant. They went to the lunchroom and identified themselves as immigration officers. Many people in the room rose and headed for the exits or milled around; others in the plant left their equipment and started running; still others who were entering the plant turned around and started walking back out. The two officers eventually stationed themselves at the

main entrance to the plant and looked for passing employees who averted their heads, avoided eye contact, or tried to hide themselves in a group. Those individuals were addressed with innocuous questions in English. Any who could not respond in English and who otherwise aroused Agent Bower's suspicions were questioned in Spanish as to their right to be in the United States.

Respondent Sandoval-Sanchez was in a line of workers entering the plant. Sandoval-Sanchez testified that he did not realize that immigration officers were checking people entering the plant, but that he did see standing at the plant entrance a man in uniform who appeared to be a police officer. Agent Bower testified that it was probable that he, not his partner, had questioned Sandoval-Sanchez at the plant, but that he could not be absolutely positive. The employee he thought he remembered as Sandoval-Sanchez had been "very evasive," had averted his head, turned around, and walked away when he saw Agent Bower. App. 137, 138. Bower was certain that no one was questioned about his status unless his actions had given the agents reason to believe that he was an undocumented alien.

Thirty-seven employees, including Sandoval-Sanchez, were briefly detained at the plant and then taken to the county jail. About one-third immediately availed themselves of the option of voluntary departure and were put on a bus to Mexico. Sandoval-Sanchez exercised his right to a deportation hearing. Sandoval-Sanchez was then questioned further, and Agent Bower recorded Sandoval-Sanchez's admission of unlawful entry. Sandoval contends he was not aware that he had a right to remain silent.

At his deportation hearing Sandoval-Sanchez contended that the evidence offered by the INS should be suppressed as the fruit of an unlawful arrest. The Immigration Judge considered and rejected Sandoval-Sanchez's claim that he had been illegally arrested, but ruled in the alternative that the legality of the arrest was not relevant to the deportation

hearing. *Matter of Sandoval-Sanchez*, No. A22 346 925 (INS, Oct. 7, 1977), reprinted in App. Pet. for Cert. at 104a. Based on the written record of Sandoval-Sanchez's admissions the Immigration Judge found him deportable and granted him voluntary departure. The BIA dismissed Sandoval-Sanchez's appeal. *In re Sandoval-Sanchez*, No. A22 346 925 (BIA, Feb. 21, 1980). It concluded that the circumstances of the arrest had not affected the voluntariness of his recorded admission, and again declined to invoke the exclusionary rule, relying on its earlier decision in *Matter of Sandoval*, *supra*.

On appeal the Court of Appeals concluded that Sandoval-Sanchez's detention by the immigration officers violated the Fourth Amendment, that the statements he made were a product of that detention, and that the exclusionary rule barred their use in a deportation hearing. The deportation order against Sandoval-Sanchez was accordingly reversed.

II

A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in this country is itself a crime. 8 U. S. C. §§ 1302, 1306, 1325. The deportation hearing looks prospectively, to the respondent's right to remain in this country in the future. Past conduct is relevant only insofar as it may shed light on the respondent's right to remain. See 8 U. S. C. §§ 1251, 1252(b); *Bugajewitz* v. *Adams*, 228 U. S. 585, 591 (1913); *Fong Yue Ting* v. *United States*, 149 U. S. 698, 730 (1893).

A deportation hearing is held before an immigration judge. The judge's sole power is to order deportation; the judge cannot adjudicate guilt or punish the respondent for any crime related to unlawful entry into or presence in this country. Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing. The respondent must be

given "a reasonable opportunity to be present at [the] proceeding," but if the respondent fails to avail himself of that opportunity the hearing may proceed in his absence. 8 U. S. C. § 1252(b). In many deportation cases the INS must show only identity and alienage; the burden then shifts to the respondent to prove the time, place, and manner of his entry. See 8 U. S. C. § 1361; *Matter of Sandoval, supra.* A decision of deportability need be based only on "reasonable, substantial, and probative evidence," 8 U. S. C. § 1252(b)(4). The BIA for its part has required only "clear, unequivocal and convincing" evidence of the respondent's deportability, not proof beyond a reasonable doubt. 8 CFR § 242.14(a) (1984). The Courts of Appeals have held, for example that the absence of *Miranda* warnings does not render an otherwise voluntary statement by the respondent inadmissible in a deportation case. *Navia-Duran* v. *INS*, 568 F. 2d 803, 808 (CA1 1977); *Avila-Gallegos* v. *INS*, 525 F. 2d 666, 667 (CA2 1975); *Chavez-Raya* v. *INS*, 519 F. 2d 397, 399–401 (CA7 1975). See also *Abel* v. *United States*, 362 U. S. 217, 236–237 (1960) (search permitted incidental to an arrest pursuant to an administrative warrant issued by the INS); *Galvan* v. *Press*, 347 U. S. 522, 531 (1954) (*Ex Post Facto* Clause has no application to deportation); *Carlson* v. *Landon*, 342 U. S. 524, 544–546 (1952) (Eighth Amendment does not require bail to be granted in certain deportation cases); *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149, 157 (1923) (involuntary confessions admissible at deportation hearing). In short, a deportation hearing is intended to provide a streamlined determination of eligibility to remain in this country, nothing more. The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws.

III

The "body" or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a

fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred. See *Gerstein* v. *Pugh*, 420 U. S. 103, 119 (1975); *Frisbie* v. *Collins*, 342 U. S. 519, 522 (1952); *United States ex rel. Bilokumsky* v. *Tod*, *supra*, at 158. A similar rule applies in forfeiture proceedings directed against contraband or forfeitable property. See, *e. g.*, *United States* v. *Eighty-Eight Thousand, Five Hundred Dollars*, 671 F. 2d 293 (CA8 1982); *United States* v. *One (1) 1971 Harley-Davidson Motorcycle*, 508 F. 2d 351 (CA9 1974); *United States* v. *One 1965 Buick*, 397 F. 2d 782 (CA6 1968).

On this basis alone the Court of Appeals' decision as to respondent Lopez must be reversed. At his deportation hearing Lopez objected only to the fact that he had been summoned to a deportation hearing following an unlawful arrest; he entered no objection to the evidence offered against him. The BIA correctly ruled that "[t]he mere fact of an illegal arrest has no bearing on a subsequent deportation proceeding." *In re Lopez-Mendoza*, *supra*, reprinted in Pet. for Cert. 102a.

IV

Respondent Sandoval has a more substantial claim. He objected not to his compelled presence at a deportation proceeding, but to evidence offered at that proceeding. The general rule in a criminal proceeding is that statements and other evidence obtained as a result of an unlawful, warrant-

[1] The Court of Appeals brushed over Lopez's failure to object to the evidence in an apparently unsettled footnote of its decision. The Court of Appeals was initially of the view that a motion to terminate a proceeding on the ground that the arrest of the respondent was unlawful is, "for all practical purposes," the same as a motion to suppress evidence as the fruit of an unlawful arrest. Slip opinion, at 1765, n. 1 (Apr. 25, 1983). In the bound report of its opinion, however, the Court of Appeals takes a somewhat different view, stating in a revised version of the same footnote that "the only reasonable way to interpret the motion to terminate is as one that includes both a motion to suppress and a motion to dismiss." 705 F. 2d 1059, 1060, n. 1 (1983).

less arrest are suppressible if the link between the evidence and the unlawful conduct is not too attenuated. *Wong Sun* v. *United States*, 371 U. S. 471 (1963). The reach of the exclusionary rule beyond the context of a criminal prosecution, however, is less clear. Although this Court has once stated in dictum that "[i]t may be assumed that evidence obtained by the [Labor] Department through an illegal search and seizure cannot be made the basis of a finding in deportation proceedings," *United States ex rel. Bilokumsky* v. *Tod*, *supra*, at 155, the Court has never squarely addressed the question before. Lower court decisions dealing with this question are sparse.[2]

In *United States* v. *Janis*, 428 U. S. 433 (1976), this Court set forth a framework for deciding in what types of proceeding application of the exclusionary rule is appropriate. Imprecise as the exercise may be, the Court recognized in *Janis* that there is no choice but to weigh the likely social benefits of excluding unlawfully seized evidence against the likely costs. On the benefit side of the balance "the 'prime purpose' of the [exclusionary] rule, if not the sole one, 'is to deter future unlawful police conduct.'" *Id.*, at 446, citing *United States* v. *Calandra*, 414 U. S. 338, 347 (1974). On the cost side there is the loss of often probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs.

At stake in *Janis* was application of the exclusionary rule in a federal civil tax assessment proceeding following the unlawful seizure of evidence by state, not federal, officials.

---

[2] In *United States* v. *Wong Quong Wong*, 94 F. 832 (Vt. 1899), a district judge excluded letters seized from the appellant in a civil deportation proceeding. In *Ex parte Jackson*, 263 F. 110 (Mont.), appeal dism'd *sub nom. Andrews* v. *Jackson*, 267 F. 1022 (CA9 1920), another district judge granted habeas corpus relief on the ground that papers and pamphlets used against the habeas petitioner in a deportation proceeding had been unlawfully seized. *Wong Chung Che* v. *INS*, 565 F. 2d 166 (CA1 1977), held that papers obtained by INS agents in an unlawful search are inadmissible in deportation proceedings.

The Court noted at the outset that "[i]n the complex and turbulent history of the rule, the Court never has applied it to exclude evidence from a civil proceeding, federal or state." 428 U. S., at 447 (footnote omitted). Two factors in *Janis* suggested that the deterrence value of the exclusionary rule in the context of that case was slight. First, the state law enforcement officials were already "punished" by the exclusion of the evidence in the state criminal trial as a result of the same conduct. *Id.*, at 448. Second, the evidence was also excludable in any federal criminal trial that might be held. Both factors suggested that further application of the exclusionary rule in the federal civil proceeding would contribute little more to the deterrence of unlawful conduct by state officials. On the cost side of the balance, *Janis* focused simply on the loss of "concededly relevant and reliable evidence." *Id.*, at 447. The Court concluded that, on balance, this cost outweighed the likely social benefits achievable through application of the exclusionary rule in the federal civil proceeding.

While it seems likely that the deterrence value of applying the exclusionary rule in deportation proceedings would be higher than it was in *Janis*, it is also quite clear that the social costs would be very much greater as well. Applying the *Janis* balancing test to the benefits and costs of excluding concededly reliable evidence from a deportation proceeding, we therefore reach the same conclusion as in *Janis*.

The likely deterrence value of the exclusionary rule in deportation proceedings is difficult to assess. On the one hand, a civil deportation proceeding is a civil complement to a possible criminal prosecution, and to this extent it resembles the civil proceeding under review in *Janis*. The INS does not suggest that the exclusionary rule should not continue to apply in criminal proceedings against an alien who unlawfully enters or remains in this country, and the prospect of losing evidence that might otherwise be used in a criminal prosecution undoubtedly supplies some residual deterrent to unlaw-

ful conduct by INS officials. But it must be acknowledged that only a very small percentage of arrests of aliens are intended or expected to lead to criminal prosecutions. Thus the arresting officer's primary objective, in practice, will be to use evidence in the civil deportation proceeding. Moreover, here, in contrast to *Janis*, the agency officials who effect the unlawful arrest are the same officials who subsequently bring the deportation action. As recognized in *Janis*, the exclusionary rule is likely to be most effective when applied to such "intrasovereign" violations.

Nonetheless, several other factors significantly reduce the likely deterrent value of the exclusionary rule in a civil deportation proceeding. First, regardless of how the arrest is effected, deportation will still be possible when evidence not derived directly from the arrest is sufficient to support deportation. As the BIA has recognized, in many deportation proceedings "the sole matters necessary for the Government to establish are the respondent's identity and alienage—at which point the burden shifts to the respondent to prove the time, place and manner of entry." *Matter of Sandoval*, 17 I. & N. Dec., at 79. Since the person and identity of the respondent are not themselves suppressible, see *supra*, at 6–7, the INS must prove only alienage, and that will sometimes be possible using evidence gathered independently of, or sufficiently attenuated from, the original arrest. See *Matter of Sandoval*, *supra*, at 79; see, *e. g.*, *Avila-Gallegos* v. *INS*, 525 F. 2d 666 (CA2 1975). The INS's task is simplified in this regard by the civil nature of the proceeding. As Justice Brandeis stated: "Silence is often evidence of the most persuasive character. . . . [T]here is no rule of law which prohibits officers charged with the administration of the immigration law from drawing an inference from the silence of one who is called upon to speak. . . . A person arrested on the preliminary warrant is not protected by a presumption of citizenship comparable to the presumption of innocence in a criminal case. There is no provision which forbids drawing

an adverse inference from the fact of standing mute." *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S., at 153–154.

The second factor is a practical one. In the course of a year the average INS agent arrests almost 500 illegal aliens. Brief for Petitioner 38. Over 97.5% apparently agree to voluntary deportation without a formal hearing. 705 F. 2d, at 1071, n. 17. Among the remainder who do request a formal hearing (apparently a dozen or so in all, per officer, per year) very few challenge the circumstances of their arrests. As noted by the Court of Appeals, "the BIA was able to find only two reported immigration cases since 1899 in which the [exclusionary] rule was applied to bar unlawfully seized evidence, only one other case in which the rule's application was specifically addressed, and fewer than fifty BIA proceedings since 1952 in which a Fourth Amendment challenge to the introduction of evidence was even raised." *Id.*, at 1071. Every INS agent knows, therefore, that it is highly unlikely that any particular arrestee will end up challenging the lawfulness of his arrest in a formal deportation proceeding. When an occasional challenge is brought, the consequences from the point of view of the officer's overall arrest and deportation record will be trivial. In these circumstances, the arresting officer is most unlikely to shape his conduct in anticipation of the exclusion of evidence at a formal deportation hearing.

Third, and perhaps most important, the INS has its own comprehensive scheme for deterring Fourth Amendment violations by its officers. Most arrests of illegal aliens away from the border occur during farm, factory, or other workplace surveys. Large numbers of illegal aliens are often arrested at one time, and conditions are understandably chaotic. See Brief for Petitioner in *INS* v. *Delgado*, O. T. 1983, No. 82–1271, pp. 3–5. To safeguard the rights of those who are lawfully present at inspected workplaces the INS has developed rules restricting stop, interrogation, and arrest prac-

tices. *Id.*, at 7, n. 7, 32–40, and n. 25. These regulations require that no one be detained without reasonable suspicion of illegal alienage, and that no one be arrested unless there is an admission of illegal alienage or other strong evidence thereof. New immigration officers receive instruction and examination in Fourth Amendment law, and others receive periodic refresher courses in law. Brief for Petitioner 39–40. Evidence seized through intentionally unlawful conduct is excluded by Department of Justice policy from the proceeding for which it was obtained. See Memorandum from Benjamin R. Civiletti to Heads of Offices, Boards, Bureaus and Divisions, Violations of Search and Seizure Law (Jan. 16, 1981). The INS also has in place a procedure for investigating and punishing immigration officers who commit Fourth Amendment violations. See Office of General Counsel, INS, U. S. Dept. of Justice, The Law of Arrest, Search, and Seizure for Immigration Officers 35 (Jan. 1983). The INS's attention to Fourth Amendment interests cannot guarantee that constitutional violations will not occur, but it does reduce the likely deterrent value of the exclusionary rule. Deterrence must be measured at the margin.

Finally, the deterrent value of the exclusionary rule in deportation proceedings is undermined by the availability of alternative remedies for institutional practices by the INS that might violate Fourth Amendment rights. The INS is a single agency, under central federal control, and engaged in operations of broad scope but highly repetitive character. The possibility of declaratory relief against the agency thus offers a means for challenging the validity of INS practices, when standing requirements for bringing such an action can be met. Cf. *INS* v. *Delgado*, 466 U. S. —— (1984).

Respondents that retention of the exclusionary rule is necessary to safeguard the Fourth Amendment rights of ethnic Americans, particularly the Hispanic-Americans lawfully in this country. We recognize that respondents raise here legitimate and important concerns. But application of the ex-

clusionary rule to civil deportation proceedings can be justified only if the rule is likely to add significant protection to these Fourth Amendment rights. The exclusionary rule provides no remedy for completed wrongs; those lawfully in this country can be interested in its application only insofar as it may serve as an effective deterrent to future INS misconduct. For the reasons we have discussed we conclude that application of the rule in INS civil deportation proceedings, as in the circumstances discussed in *Janis*, "is unlikely to provide significant, much less substantial, additional deterrence." 428 U. S., at 458. Important as it is to protect the Fourth Amendment rights of all persons, there is no convincing indication that application of the exclusionary rule in civil deportation proceedings will contribute materially to that end.

On the other side of the scale, the social costs of applying the exclusionary rule in deportation proceedings are both unusual and significant. The first cost is one that is unique to continuing violations of the law. Applying the exclusionary rule in proceedings that are intended not to punish past transgressions but to prevent their continuance or renewal would require the courts to close their eyes to ongoing violations of the law. This Court has never before accepted costs of this character in applying the exclusionary rule.

Presumably no one would argue that the exclusionary rule should be invoked to prevent an agency from ordering corrective action at a leaking hazardous waste dump if the evidence underlying the order had been improperly obtained, or to compel police to return contraband explosives or drugs to their owner if the contraband had been unlawfully seized. On the rare occasions that it has considered costs of this type the Court has firmly indicated that the exclusionary rule does not extend this far. See *United States* v. *Jeffers*, 342 U. S. 48, 54 (1951); *Trupiano* v. *United States*, 334 U. S. 699, 710 (1948). The rationale for these holdings is not difficult to find. "Both *Trupiano* and *Jeffers* concerned objects the pos-

session of which, without more, constitutes a crime. The repossession of such *per se* contraband by Jeffers and Trupiano would have subjected them to criminal penalties. The return of the contraband would clearly have frustrated the express public policy against the possession of such objects." *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693, 699 (1965) (footnote omitted). Precisely the same can be said here. Sandoval is a person whose unregistered presence in this country, without more, constitutes a crime.[3] His release within our borders would immediately subject him to criminal penalties. His release would clearly frustrate the express public policy against an alien's unregistered presence in this country. Even the objective of deterring Fourth Amendment violations should not require such a result. The constable's blunder may allow the criminal to go free, but we have never suggested that it allows the criminal to continue in the commission of an ongoing crime. When the crime in question involves unlawful presence in this country, the criminal may go free, but he should not go free within our borders.[4]

---

[3] Sandoval was arrested on June 23, 1977. His deportation hearing was held on October 7, 1977. By that time he was under a duty to apply for registration as an alien. A failure to do so plainly constituted a continuing crime. 8 U. S. C. §§ 1302, 1306. Sandoval was not, of course, prosecuted for this crime, and we do not know whether or not he did make the required application. But it is safe to assume that the exclusionary rule would never be at issue in a deportation proceeding brought against an alien who entered the country unlawfully and then voluntarily admitted to his unlawful presence in an application for registration.

Sandoval was also not prosecuted for his initial illegal entry into this country, an independent crime under 8 U. S. C. § 1325. We need not decide whether or not remaining in this country following an illegal entry is a continuing or a completed crime under § 1325. The question is academic, of course, since in either event the unlawful entry remains both punishable and continuing grounds for deportation. See 8 U. S. C. § 1251(a)(2).

[4] Similarly, in *Sure-Tan, Inc.* v. *NLRB*, —— U. S. —— (1984), the Court concluded that an employer can be guilty of an unfair labor practice in his dealings with an alien notwithstanding the alien's illegal presence in

Other factors also weigh against applying the exclusionary rule in deportation proceedings. The INS currently operates a deliberately simple deportation hearing system, streamlined to permit the quick resolution of very large numbers of deportation actions, and it is against this backdrop that the costs of the exclusionary must be assessed. The costs of applying the exclusionary rule, like the benefits, must be measured at the margin.

The average immigration judge handles about six deportation hearings per day. Brief for Petitioner 27, n. 16. Neither the hearing officers nor the attorneys participating in those hearings are likely to be well versed in the intricacies of Fourth Amendment law. The prospect of even occasional invocation of the exclusionary rule might significantly change and complicate the character of these proceedings. The BIA has described the practical problems as follows:

> "Absent the applicability of the exclusionary rule, questions relating to deportability routinely involve simple factual allegations and matters of proof. When Fourth Amendment issues are raised at deportation hearings, the result is a diversion of attention from the main issues which those proceedings were created to resolve, both in terms of the expertise of the administrative decision makers and of the structure of the forum to accommodate inquiries into search and seizure questions. The result frequently seems to be a long, confused record in which the issues are not clearly defined and in which there is voluminous testimony . . . . The ensuing delays and inordinate amount of time spent on such cases at all levels has an adverse impact on the effective adminis-

---

this country. Retrospective sanctions against the employer may accordingly be imposed by the NLRB to further the public policy against unfair labor practices. But while he maintains the status of an illegal alien, the employee is plainly not entitled to the prospective relief—reinstatement and continued employment—that probably would be granted to other victims of similar unfair labor practices.

> tration of the immigration laws . . . . This is particularly true in a proceeding where delay may be the only 'defense' available and where problems already exist with the use of dilatory tactics." *Matter of Sandoval*, 17 I. & N., at 80 (footnote omitted).

This sober assessment of the exclusionary rule's likely costs, by the agency that would have to administer the rule in at least the administrative tiers of its application, cannot be brushed off lightly.

The BIA's concerns are reinforced by the staggering dimension of the problem that the INS confronts. Immigration officers apprehend over one million deportable aliens in this country every year. *Id.*, at 85. A single agent may arrest many illegal aliens every day. Although the investigatory burden does not justify the commission of constitutional violations, the officers cannot be expected to compile elaborate, contemporaneous, written reports detailing the circumstances of every arrest. At present an officer simply completes a "Record of Deportable Alien" that is introduced to prove the INS's case at the deportation hearing; the officer rarely must attend the hearing. Fourth Amendment suppression hearings would undoubtedly require considerably more, and the likely burden on the administration of the immigration laws would be correspondingly severe.

Finally, the INS advances the credible argument that applying the exclusionary rule to deportation proceedings might well result in the suppression of large amounts of information that had been obtained entirely lawfully. INS arrests occur in crowded and confused circumstances. Though the INS agents are instructed to follow procedures that adequately protect Fourth Amendment interests, agents will usually be able to testify only to the fact that they followed INS rules. The demand for a precise account of exactly what happened in each particular arrest would plainly preclude mass arrests, even when the INS is confronted, as it often is, with massed numbers of ascertainably illegal aliens,

and even when the arrests can be and are conducted in full compliance with all Fourth Amendment requirements.

In these circumstances we are persuaded that the *Janis* balance between costs and benefits comes out against applying the exclusionary rule in civil deportation hearings held by the INS. By all appearances the INS has already taken sensible and reasonable steps to deter Fourth Amendment violations by its officers, and this makes the likely additional deterrent value of the exclusionary rule small. The costs of applying the exclusionary rule in the context of civil deportation hearings are high. In particular, application of the exclusionary rule in cases such as Sandoval's, would compel the courts to release from custody persons who would then immediately resume their commission of a crime through their continuing, unlawful presence in this country. "There comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches." *United States* v. *Janis*, 428 U. S., at 459. That point has been reached here.

V

We do not condone any violations of the Fourth Amendment that may have occurred in the arrests of respondents Lopez or Sandoval. Moreover, no challenge is raised here to the INS's own internal regulations. Cf. *INS* v. *Delgado*, —— U. S. —— (1984). Our conclusions concerning the exclusionary rule's value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread. Cf. *United States* v. *Leon*, —— U. S. —— (BLACKMUN, J., concurring). Finally, we do not deal here with egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence

obtained.[5] Cf. *Rochin* v. *California*, 342 U. S. 165 (1952). At issue here is the exclusion of credible evidence gathered in connection with peaceful arrests by INS officers. We hold that evidence derived from such arrests need not be suppressed in an INS civil deportation hearing.

The judgment of the Court of Appeals is therefore

Reversed.

[5] We note that subsequent to its decision in *Matter of Sandoval*, 17 I. & N. Dec. 70 (1979), the BIA held that evidence will be excluded if the circumstances surrounding a particular arrest and interrogation would render use of the evidence obtained thereby "fundamentally unfair" and in violation of due process requirements of the fifth amendment. *Matter of Toro*, 17 I. &. N. Dec. 340, 343 (BIA 1980). See also *Matter of Garcia*, 17 I. & N. Dec. 319, 321 (BIA 1980) (suppression of admission of alienage obtained after request for counsel had been repeatedly refused); *Matter of Ramira-Cordova*, No. A21 095 659 (BIA Feb. 21, 1980) (suppression of evidence obtained as a result of a night-time warrantless entry into the aliens' residence).

SUPREME COURT OF THE UNITED STATES

No. 83–491

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER *v.* ADAN LOPEZ-MENDOZA ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[July 5, 1984]

JUSTICE BRENNAN, dissenting.

JUSTICE WHITE that under the analysis urt in such cases as *United St* I fully agree with developed by the Court in such cases as *United States* v. (1976), and *United States* v. *Cal* *Janis*, 428 U. S. 433 (1976), and *United States* v. *Calandra*, he exclusionary rule must apply 414 U. S. 338 (1974), the exclusionary rule must apply in civil ngs. However, for the reaso deportation proceedings. However, for the reasons set forth today in my dissenting opinion in *United States* v. *Leon*, *ante*, at ——, I believe the basis for the exclusionary rule does not derive from its effectiveness as a deterrent, but is instead found in the requirements of the Fourth Amendment itself. My view of the exclusionary rule would, of course, require affirmance of the Court of Appeals. In this case, federal law enforcement officers arrested respondents Sandoval-Sanchez and Lopez-Mendoza in violation of their Fourth Amendment rights. The subsequent admission of any evidence secured pursuant to these unlawful arrests in civil deportation proceedings would, in my view, also infringe those rights. The Government of the United States bears an obligation to obey the Fourth Amendment; that obligation is not lifted simply because the law enforcement officers were agents of the Immigration and Naturalization Service, nor because the evidence obtained by those officers was to be used in civil deportation proceedings.

SUPREME COURT OF THE UNITED STATES

No. 83-491

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER *v.* ADAN LOPEZ-MENDOZA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[July 5, 1984]

dissenting

holds that the exclusionary rule doe
ration proceedings. Because I
of the majority is based upon an

JUSTICE WHITE, dissenting.

The Court today holds that the exclusionary rule does not apply in civil deportation proceedings. Because I believe that the conclusion of the majority is based upon an incorrect assessment of the costs and benefits of applying the rule in such proceedings, I respectfully dissent.[1]

The paradigmatic case in which the exclusionary rule is applied is when the prosecutor seeks to use evidence illegally obtained by law enforcement officials in his case-in-chief in a criminal trial. In other classes of cases, the rule is applicable only when the likelihood of deterring the unwanted conduct outweighs the societal costs imposed by exclusion of relevant evidence. *United States* v. *Janis*, 428 U. S. 433, 454 (1976). Thus, the Court has, in a number of situations, refused to extend the exclusionary rule to proceedings other than the criminal trial itself. For example, in *Stone* v. *Powell*, 428 U. S. 465 (1976), the Court held that the deterrent effect of

[1] I also question the Court's finding that Lopez failed to object to admission of the evidence. *Ante*, at 7 and n. 1. The Court of Appeals held that he had made a proper objection, *Lopez-Mendoza* v. *INS*, 705 F. 2d 1059, 1060, n. 1. (CA9 1983), and the Government did not seek review of that conclusion. Brief for Petitioner 8, n. 8. Moreover, the fact that changes in an opinion are made between the time of the slip opinion and the bound volume has never before been considered evidence that the holding of case is "unsettled." See *ante*, at 7, n. 1.

the rule would not be reduced by refusing to allow a state prisoner to litigate a Fourth Amendment claim in federal habeas corpus proceedings if he was afforded a full and fair opportunity to litigate it in state court. Similarly, in *United States* v. *Calandra*, 414 U. S. 338, 351 (1974), we concluded that "[a]ny incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best." And in *United States* v. *Janis*, *supra*, we declined to extend the exclusionary rule to bar the introduction in a federal civil proceeding of evidence unconstitutionally seized by a state law enforcement officer. In all of these cases it was unquestioned that the illegally seized evidence would not be admissible in the case-in-chief of the proceeding for which the evidence was gathered; only its collateral use was permitted.

Civil deportation proceedings are in no sense "collateral." The majority correctly acknowledges that the "primary objective" of the INS agent is "to use evidence in the civil deportation proceeding" and that "the agency officials who effect the unlawful arrest are the same officials who subsequently bring the deportation action." *Ante*, at 9–10. The Government likewise concedes that INS agents are "in the business of conducting searches for and seizures of illegal aliens for the purpose of bringing about their deportation." Brief for Petitioner 37. Thus, unlike the situation in *Janis*, the conduct challenged here falls within "the offending officer's zone of primary interest." 428 U. S., at 458. The majority nonetheless concludes that application of the rule in such proceedings is unlikely to provide significant deterrence. Because INS agents are law enforcement officials whose mission is closely analogous to that of police officers and because civil deportation proceedings are to INS agents what criminal trials are to police officers, I cannot agree with that assessment.

The exclusionary rule rests on the Court's belief that exclusion has a sufficient deterrent effect to justify its imposition,

and the Court has not abandoned the rule. As long as that is the case, there is no principled basis for distinguishing between the deterrent effect of the rule in criminal cases and in civil deportation proceedings. The majority attempts to justify the distinction by asserting that deportation will still be possible when evidence not derived from the illegal search or seizure is independently sufficient. *Ante*, at 10. However, that is no less true in criminal cases. The suppression of some evidence does not bar prosecution for the crime, and in many cases even though some evidence is suppressed a conviction will nonetheless be obtained.

The majority also suggests that the fact that most aliens elect voluntary departure dilutes the deterrent effect of the exclusionary rule, because the infrequency of challenges to admission of evidence will mean that "the consequences from the point of view of the officer's overall arrest and deportation record will be trivial." *Ante*, at 11. It is true that a majority of apprehended aliens elect voluntary departure, while a lesser number go through civil deportation proceedings and a still smaller number are criminally prosecuted. However, that fact no more diminishes the importance of the exclusionary sanction than the fact that many criminal defendants plead guilty dilutes the rule's deterrent effect in criminal cases. The possibility of exclusion of evidence quite obviously plays a part in the decision whether to contest either civil deportation or criminal prosecution. Moreover, in concentrating on the incentives under which the individual agent operates to the exclusion of the incentives under which the agency as a whole operates neglects the "systemic" deterrent effect that may lead the agency to adopt policies and procedures that conform to Fourth Amendment standards. See, *e. g.*, *Dunaway* v. *New York*, 442 U. S. 200, 221 (1979) (JUSTICE STEVENS, concurring).

The majority believes "perhaps most important" the fact that the INS has a "comprehensive scheme" in place for de-

terring Fourth Amendment violations by punishing agents who commit such violations, but it points to not a single instance in which that scheme has been invoked.[2] *Ante*, at 11–12. Also, immigration officers are instructed and examined in Fourth Amendment law, and it is suggested that this education is another reason why the exclusionary rule is unnecessary. *Id.*, at 11. A contrary lesson could be discerned from the existence of these programs, however, when it is recalled that they were instituted during "a legal regime in which the cases and commentators uniformly sanctioned the invocation of the rule in deportation proceedings." *Lopez-Mendoza* v. *INS*, 705 F. 2d 1059, 1071 (CA9 1983). Thus, rather than supporting a conclusion that the exclusionary rule is unnecessary, the existence of these programs instead suggests that the exclusionary rule has created incentives for the agency to ensure that its officers follow the dictates of the Constitution. Since the deterrent function of the rule is furthered if it alters either "the behavior of individual law enforcement officers or the policies of their departments," *United States* v. *Leon*, —— U. S., at ——, it seems likely that it was the rule's deterrent effect that led to the programs to which the Court now points for its assertion that the rule would have no deterrent effect.

The suggestion that alternative remedies, such as civil suits, provide adequate protection is unrealistic. Contrary to the situation in criminal cases, once the Government has improperly obtained evidence against an illegal alien, he is removed from the country and is therefore in no position to file civil actions in federal courts. Moreover, those who are

---

[2] The Government suggests that INS disciplinary rules are "not mere paper procedures" and that over a period of four years 20 officers were suspended or terminated for misconduct toward aliens. Brief for Petitioner 45, n. 28. The Government does not assert, however, that any of these officers were disciplined for Fourth Amendment violations, and it appears that the 11 officers who were terminated were terminated for rape or assault. See Brief for Respondent 60, n. 42.

legally in the country but are nonetheless subjected to illegal searches and seizures are likely to be poor, uneducated, and many will not speak English. It is doubtful that the threat of civil suits by these persons will strike fear into the hearts of those who enforce the Nation's immigration laws.

It is also my belief that the majority exaggerates the costs associated with applying the exclusionary rule in this context. Evidence obtained through violation of the Fourth Amendment is not automatically suppressed, and any inquiry into the burdens associated with application of the exclusionary rule must take that fact into account. In *United States* v. *Leon*, *supra*, we have held that the exclusionary rule is not applicable when officers are acting in objective good faith. Thus, if the agents neither knew nor should have known that they were acting contrary to the dictates of the Fourth Amendment, evidence will not be suppressed even if it is held that their conduct was illegal.

As the majority notes, *ante*, at 17–18, n. 5, the BIA has already held that evidence will be suppressed if it results from egregious violations of constitutional standards. Thus, the mechanism for dealing with suppression motions exists and is utilized, significantly decreasing the force of the majority's predictions of dire consequences flowing from "even occasional invocation of the exclusionary rule." *Ante*, at 15. Although the standard currently utilized by the BIA may not be precisely coextensive with the good-faith exception, any incremental increase in the amount of evidence that is suppressed through application of *Leon* is unlikely to be significant. Likewise, any difference that may exist between the two standards is unlikely to increase significantly the number of suppression motions filed.

Contrary to the view of the majority, it is not the case that Sandoval's "unregistered presence in this country, without more, constitutes a crime." *Ante*, at 14. Section 275 of the Immigration and Nationality Act makes it a crime to enter

the United States illegally. 8 U. S. C. § 1325.[3] The first offense constitutes a misdemeanor, and subsequent offenses constitute felonies. *Ibid.* Those few cases that have construed this statute have held that a violation takes place at the time of entry and that the statute does not describe a continuing offense. *Gonzales* v. *City of Peoria*, 722 F. 2d 468, 473–474 (CA9 1983); *United States* v. *Rincon-Jiminez*, 595 F. 2d 1192, 1194 (CA9 1979). Although this Court has not construed the statute, it has suggested in dictum that this interpretation is correct, *United States* v. *Cores*, 356 U. S. 405, 408, n. 6, and it is relatively clear that such an interpretation is most consistent with the statutory language. Therefore, it is simply not the case that suppressing evidence in deportation proceedings will "allo[w] the criminal to continue in the commission of an ongoing crime." *Ante*, at 14. It is true that some courts have construed § 276 of the Act, 8 U. S. C. § 1326, which applies to aliens previously deported who enter or are found in the United States, to describe a continuing offense.[4] *United States* v. *Bruno*, 328 F. Supp. 815 (W. D. Mo. 1971); *United States* v. *Alvarado-Soto*, 120 F. Supp. 848 (SD Cal. 1954); *United States* v. *Rincon-Jiminez*, *supra* (dictum). But see *United States* v. *DiSantillo*, 615 F. 2d 128 (CA3 1980). In such cases, however, the Government will have a record of the prior deportation and will have little

[3] Section 275 provides in part:

"Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by a willfully false or misleading representation . . . shall be guilty of a [crime]. . . ." 8 U. S. C. § 1325.

[4] Section 276 provides in part:

"Any alien who—

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States . . .

shall be guilty of a felony." 8 U. S. C. § 1326.

need for any evidence that might be suppressed through application of the exclusionary rule. See *United States* v. *Pineda-Chinchilla*, 712 F. 2d 942 (CA5 1983), cert. denied, —— U. S. —— (1983) (illegality of arrest does not bar introduction of INS records to demonstrate prior deportation).

Although the majority relies on the registration provisions of 8 U. S. C. §§ 1302 and 1306 for its "continuing crime" argument, those provisions provide little support for the general rule laid down that the exclusionary rule does not apply in civil deportation proceedings. First, § 1302 requires that aliens register within 30 days of entry into the country. Thus, for the first 30 days failure to register is not a crime. Second, § 1306 provides that only *willful* failure to register is a misdemeanor. Therefore, "unregistered presence in this country, without more," *ante*, at 14, does not constitute a crime; rather, unregistered presence plus willfulness must be shown. There is no finding that Sandoval willfully failed to register, which is a necessary predicate to the conclusion that he is engaged in a continuing crime. Third, only aliens fourteen years of age or older are required to register; those under fourteen years of age are to be registered by their parents or guardian. By the majority's reasoning, therefore, perhaps the exclusionary rule should apply in proceedings to deport children under fourteen, since their failure to register does not constitute a crime.

Application of the rule, we are told, will also seriously interfere with the "streamlined" nature of deportation hearings because "[n]either the hearing officers nor the attorneys participating in those hearings are likely to be well-versed in the intricacies of Fourth Amendment law." *Ante*, at 15. Yet the majority deprecates the deterrent benefit of the exclusionary rule in part on the ground that immigration officers receive a thorough education in Fourth Amendment law. *Id.*, at 11. The implication that hearing officers should defer to law enforcement officers' superior understanding of constitutional principles is startling indeed.

Prior to the decision of the Board of Immigration Appeals in *Matter of Sandoval*, 17 I. & N. Dec. 70 (1979), neither the Board nor any court had held that the exclusionary rule did not apply in civil deportation proceedings. *Lopez-Mendoza* v. *INS*, 705 F. 2d, at 1071. The Board in *Sandoval* noted that there were "fewer than fifty" BIA proceedings since 1952 in which motions had been made to suppress evidence on Fourth Amendment grounds. This is so despite the fact that "immigration law practitioners have been informed by the major treatise in their field that the exclusionary rule was available to clients facing deportation. *See* 1A C. Gordon and H. Rosenfield, Immigration Law and Procedure § 5.2c at 5–31 (rev. ed. 1980)." *Lopez-Mendoza* v. *INS*, *supra*, at 1071. The suggestion that "[t]he prospect of even occasional invocation of the exclusionary rule might significantly change and complicate the character of these proceedings," *ante*, at 15, is thus difficult to credit. The simple fact is that prior to 1979 the exclusionary rule was available in civil deportation proceedings and there is no indication that it significantly interfered with the ability of the INS to function.

Finally, the majority suggests that application of the exclusionary rule might well result in the suppression of large amounts of information legally obtained because of the "crowded and confused circumstances" surrounding mass arrests. *Ante*, at 16. The result would be that INS agents would have to keep a "precise account of exactly what happened in each particular arrest," which would be impractical considering the "massed numbers of ascertainably illegal aliens." *Ante*, at 16. Rather than constituting a rejection of the application of the exclusionary rule in civil deportation proceedings, however, this argument amounts to a rejection of the application of the Fourth Amendment to the activities of INS agents. If the pandemonium attending immigration arrests is so great that violations of the Fourth Amendment cannot be ascertained for the purpose of applying the exclusionary rule, there is no reason to think that such violations

can be ascertained for purposes of civil suits or internal disciplinary proceedings, both of which are proceedings that the majority suggests provide adequate deterrence against Fourth Amendment violations. The Court may be willing to throw up its hands in dismay because it is administratively inconvenient to determine whether constitutional rights have been violated, but we neglect our duty when we subordinate constitutional rights to expediency in such a manner. Particularly is this so when, as here, there is but a weak showing that administrative efficiency will be seriously compromised.

In sum, I believe that the costs and benefits of applying the exclusionary rule in civil deportation proceedings do not differ in any significant way from the costs and benefits of applying the rule in ordinary criminal proceedings. Unless the exclusionary rule is to be wholly done away with and the Court's belief that it has deterrent effects abandoned, it should be applied in deportation proceedings when evidence has been obtained by deliberate violations of the Fourth Amendment or by conduct a reasonably competent officer would know is contrary to the Constitution. Accordingly, I dissent.

SUPREME COURT OF THE UNITED STATES

No. 83–491

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER *v.* ADAN LOPEZ-MENDOZA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[July 5, 1984]

dissenting.

WHITE that application to this ca
odied in the decisions of the Cou
428 U. S. 433 (1976), and

JUSTICE MARSHALL, dissenting.

I agree with JUSTICE WHITE that application to this case of the mode of analysis embodied in the decisions of the Court in *United States* v. *Janis*, 428 U. S. 433 (1976), and *United States* v. *Calandra*, 414 U. S. 338 (1974), compels the conclusion that the exclusionary rule should apply in civil deportation proceedings. *Ante*, at ——. However, I continue to believe that that mode of analysis fails to reflect the constitutionally mandated character of the exclusionary rule. See *United States* v. *Leon*, *ante*, at —— (BRENNAN, J., joined by MARSHALL, J., dissenting); *United States* v. *Janis*, 428 U. S., at 460 (BRENNAN, J., joined by MARSHALL, J., dissenting). In my view, a sufficient reason for excluding from civil deportation proceedings evidence obtained in violation of the Fourth Amendment is that there is no other way to achieve "the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government." *United States* v. *Calandra*, 414 U. S., at 357 (BRENNAN, J., joined by MARSHALL, J., dissenting).

SUPREME COURT OF THE UNITED STATES

No. 83–491

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER *v.* ADAN LOPEZ-MENDOZA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[July 5, 1984]

JUSTICE STEVENS, dissenting.

Because the Court has not yet held that the rule of *United States* v. *Leon*, —— U. S. —— has any application to warrantless searches, I do not join the portion of JUSTICE WHITE's opinion that relies on that case. I do, however, agree with the remainder of his dissenting opinion.

excluding
ruk

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MASSACHUSETTS *v.* SHEPPARD

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 82–963. Argued January 17, 1984—Decided July 5, 1984

gathered in the investigation of a homic
ton, a police detective drafted an affidavit
an arrest warrant and a search warrant a
ndent's residence. The affidavit stated
for certain described items, including clo
nstrument that might have been used on

On the basis of evidence gathered in the investigation of a homicide in the Roxbury section of Boston, a police detective drafted an affidavit to support an application for an arrest warrant and a search warrant authorizing the search of respondent's residence. The affidavit stated that the police wished to search for certain described items, including clothing of the victim and a blunt instrument that might have been used on the victim. The affidavit was reviewed and approved by the District Attorney. Because it was Sunday, the local court was closed, and the police had a difficult time finding a warrant application form. The detective finally found a warrant form previously used in another district to search for controlled substances. After making some changes in the form, the detective presented it and the affidavit to a judge at his residence, informing him that the warrant form might need to be further changed. Concluding that the affidavit established probable cause to search respondent's residence and telling the detective that the necessary changes in the warrant form would be made, the judge made some changes, but did not change the substantive portion, which continued to authorize a search for controlled substances, nor did he alter the form so as to incorporate the affidavit. The judge then signed the warrant and returned it and the affidavit to the detective, informing him that the warrant was sufficient authority in form and content to carry out the requested search. The ensuing search of respondent's residence by the detective and other police officers was limited to the items listed in the affidavit, and several incriminating pieces of evidence were discovered. Thereafter, respondent was charged with first-degree murder. At a pretrial suppression hearing, the trial judge ruled that notwithstanding the warrant was defective under the Fourth Amendment in that it did not particularly describe the items to be seized, the incriminating evidence

could be admitted because the police had acted in good faith in executing what they reasonably thought was a valid warrant. At the subsequent trial, respondent was convicted. The Massachusetts Supreme Judicial Court held that the evidence should have been suppressed.

Held: Federal law does not require the exclusion of the disputed evidence. Pp. 5–8.

(a) The exclusionary rule should not be applied when the officer conducting the search acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate that subsequently is determined to be invalid. *United States* v. *Leon*, *ante*, p. ——. P. 5.

(b) Here, there was an objectively reasonable basis for the officers' mistaken belief that the warrant authorized the search they conducted. The officers took every step that could reasonably be expected of them. At the point where the judge returned the affidavit and warrant to the detective, a reasonable police officer would have concluded, as the detective did, that the warrant authorized a search of the materials outlined in the affidavit. P. 6.

(c) A police officer is not required to disbelieve a judge who has just advised him that the warrant he possesses authorizes him to conduct the search he has requested. Pp. 6–7.

(d) An error of constitutional dimensions may have been committed with respect to the issuance of the warrant in this case, but it was the judge, not the police officer, who made the critical mistake. Suppression of evidence because the judge failed to make all the necessary clerical corrections despite his assurance that such changes would be made will not serve the deterrent function that the exclusionary rule was designed to achieve. Pp. 7–8.

387 Mass. 488, 441 N. E. 2d 725, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment (see No. 82–1771). BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined (see No. 82–1771).

SUPREME COURT OF THE UNITED STATES

No. 82-963

MASSACHUSETTS, PETITIONER *v.*
OSBORNE SHEPPARD

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

[July 5, 1984]

JUSTICE WHITE delivered the opinion of the Court.

This case involves the application of the rules articulated today in *United States* v. *Leon*, *ante*, to a situation in which police officers seize items pursuant to a warrant subsequently invalidated because of a technical error on the part of the issuing judge.

I

The badly burned body of Sandra Boulware was discovered in a vacant lot in the Roxbury section of Boston at approximately 5 a. m., Saturday, May 5, 1979. An autopsy revealed that Boulware had died of multiple compound skull fractures caused by blows to the head. After a brief investigation, the police decided to question one of the victim's boyfriends, Osborne Sheppard. Sheppard told the police that he had last seen the victim on Tuesday night and that he had been at a local gaming house (where cards games were played) from 9 p. m. Friday until 5 a. m. Saturday. He identified several people who would be willing to substantiate the latter claim.

By interviewing the people Sheppard had said were at the gaming house on Friday night, the police learned that although Sheppard was at the gaming house that night, he had borrowed an automobile at about 3 a. m. Saturday morning in order to give two men a ride home. Even though the trip normally took only fifteen minutes, Sheppard did not return with the car until nearly 5 a. m.

On Sunday morning, police officers visited the owner of the car Sheppard had borrowed. He consented to an inspection of the vehicle. Bloodstains and pieces of hair were found on the rear bumper and within the trunk compartment. In addition, the officers noticed strands of wire in the the trunk similar to wire strands found on and near the body of the victim. The owner of the car told the officers that when he last used the car on Friday night, shortly before Sheppard borrowed it, he had placed articles in the trunk and had not noticed any stains on the bumper or in the trunk.

On the basis of the evidence gathered thus far in the investigation, Detective Peter O'Malley drafted an affidavit designed to support an application for an arrest warrant and a search warrant authorizing a search of Sheppard's residence. The affidavit set forth the results of the investigation and stated that the police wished to search for

> "[a] fifth bottle of amaretto liquor, 2 nickel bags of marijuana, a woman's jacket that has been described as black-grey (charcoal), any possessions of Sandra D. Boulware, similar type wire and rope that match those on the body of Sandra D. Boulware, or in the above Thunderbird. A blunt instrument that might have been used on the victim, men's or women's clothing that may have blood, gasoline burns on them. Items that may have fingerprints of the victim."[1]

Detective O'Malley showed the affidavit to the district attorney, the district attorney's first assistant, and a sergeant, who all concluded that it set forth probable cause for the search and the arrest. 387 Mass. 488, 492, 441 N. E. 2d 725, 727 (1982).

Because it was Sunday, the local court was closed, and the police had a difficult time finding a warrant application form.

[1]The liquor and marihuana were included in the request because Sheppard had told the officers that when he was last with the victim, the two had purchased two bags of marihuana and a fifth of amaretto before going to his residence.

Detective O'Malley finally found a warrant form previously in use in the Dorchester District. The form was entitled "Search Warrant—Controlled Substance G. L. c. 276 §§1 through 3A." Realizing that some changes had to be made before
the form could be used to authorize the search requested in the affidavit, Detective O'Malley deleted the subtitle "controlled substance" with a typewriter. He also substituted "Roxbury" for the printed "Dorchester" and typed Sheppard's name and address into blank spaces provided for that information. However, the reference to "controlled substance" was not deleted in the portion of the form that constituted the warrant application and that, when signed, would constitute the warrant itself.

Detective O'Malley then took the affidavit and the warrant form to the residence of a judge who had consented to consider the warrant application. The judge examined the affidavit and stated that he would authorize the search as requested. Detective O'Malley offered the warrant form and stated that he knew the form as presented dealt with controlled substances. He showed the judge where he had crossed out the subtitles. After unsuccessfully searching for a more suitable form, the judge informed O'Malley that he would make the necessary changes so as to provide a proper search warrant. The judge then took the form, made some changes on it, and dated and signed the warrant. However, he did not change the substantive portion of the warrant, which continued to authorize a search for controlled substances;[2] nor did he alter the form so as to incorporate the affidavit. The judge returned the affidavit and the warrant to O'Malley, informing him that the warrant was sufficient authority in form and content to carry out the search as re-

[2]The warrant directed the officers to "search for any controlled substance, article, implement or other paraphernalia used in, for, or in connection with the unlawful possession or use of any controlled substance, and to seize and securely keep the same until final action . . . ."

quested.[3] O'Malley took the two documents and, accompanied by other officers, proceeded to Sheppard's residence. The scope of the ensuing search was limited to the items listed in the affidavit, and several incriminating pieces of evidence were discovered.[4] Sheppard was then charged with first degree murder.

At a pretrial suppression hearing, the trial judge concluded that the warrant failed to conform to the commands of the Fourth Amendment because it did not particularly describe the items to be seized. The judge ruled, however, that the evidence could be admitted notwithstanding the defect in the warrant because the police had acted in good faith in executing what they reasonably thought was a valid warrant. App. 35a. At the subsequent trial, Sheppard was convicted.

On appeal, Sheppard argued that the evidence obtained pursuant to the defective warrant should have been suppressed. The Supreme Judicial Court of Massachusetts agreed. A plurality of the justices concluded that although

of the justices concluded that a

---

[3] Sheppard contends that there is no evidence in the record that the judge spoke to O'Malley after he made the changes. Brief for Respondent 11, n. 4. However, the trial judge expressly found that the judge "informed Detective O'Malley that the warrant as delivered over was sufficient authority in form and content to carry out the search as requested," App. 27a, and a plurality of the Supreme Judicial Court noted that finding without any apparent disapproval. 387 Mass., at 497, 441 N. E. 2d, at 730. Since it would have been reasonable for O'Malley to infer that the warrant was valid when the judge made some changes after assuring him that the form would be corrected, an express assurance that the warrant was adequate would add little to the reasonableness of O'Malley's belief that the necessary changes had been made. Therefore, nothing would be served by combing the record to determine whether there is sufficient evidence to support the trial court's finding that the judge spoke to O'Malley after signing the warrant.

[4] The police found a pair of bloodstained boots, blood stains on the concrete floor, a woman's earring with bloodstains on it, a bloodstained envelope, a pair of men's jockey shorts and women's leotards with blood on them, three types of wire, and a woman's hairpiece, subsequently identified as the victim's.

"the police conducted the search in a good faith belief, reasonably held, that the search was lawful and authorized by the warrant issued by the judge," 387 Mass., at 503, 441 N. E. 2d, at 733, the evidence had to be excluded because this Court had not recognized a good-faith exception to the exclusionary rule. Two justices combined in a separate concurrence to stress their rejection of the good-faith exception, and one justice dissented, contending that since exclusion of the evidence in this case would not serve to deter any police misconduct, the evidence should be admitted. We granted certiorari and set the case for argument in conjunction with *United States* v. *Leon*, *ante*.

II

Having already decided that the exclusionary rule should not be applied when the officer conducting the search acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate that subsequently is determined to be invalid, *id.*, at ——, the sole issue before us in this case is whether the officers reasonably believed that the search they conducted was authorized by a valid warrant.[5]

[5] Both the trial court, App. 32a, and a majority of the Supreme Judicial Court, 387 Mass., at 500–501, 441 N. E. 2d, at 731–732; *id.*, at 510, 441 N. E. 2d, at 737 (Liacos, J., concurring), concluded that the warrant was constitutionally defective because the description in the warrant was completely inaccurate and the warrant did not incorporate the description contained in the affidavit. Petitioner does not dispute this conclusion.

Petitioner does argue, however, that even though the warrant was invalid, the search was constitutional because it was reasonable within the meaning of the Fourth Amendment. Brief for Petitioner 28–32. The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional. *Stanford* v. *Texas*, 379 U. S. 476 (1965); *United States* v. *Cardwell*, 680 F. 2d 75, 77–78 (CA9 1982); *United States* v. *Crozier*, 674 F. 2d 1293, 1299 (CA9 1982); *United States* v. *Klein*, 565 F. 2d 183, 185 (CA1 1977); *United States* v. *Gardner*, 537 F. 2d 861, 862 (CA6 1976); *United States* v. *Marti*, 421 F. 2d 1263, 1268–1269 (CA2 1970). That rule is in keeping with the well-established principle that "except in certain carefully defined classes of cases, a search of private property with-

There is no dispute that the officers believed that the warrant authorized the search that they conducted. Thus, the only question is whether there was an objectively reasonable basis for the officers' mistaken belief. Both the trial court, App. 35a, and a majority of the Supreme Judicial Court, 387 Mass., at 503, 441 N. E. 2d, at 733; *id.*, at 524–525, 441 N. E. 2d, at 745 (Lynch, J., dissenting), concluded that there was. We agree.

The officers in this case took every step that could reasonably be expected of them. Detective O'Malley prepared an affidavit which was reviewed and approved by the District Attorney. He presented that affidavit to a neutral judge. The judge concluded that the affidavit established probable cause to search Sheppard's residence, App. 26a, and informed O'Malley that he would authorize the search as requested. O'Malley then produced the warrant form and informed the judge that it might need to be changed. He was told by the judge that the necessary changes would be made. He then observed the judge make some changes and received the warrant and the affidavit. At this point, a reasonable police officer would have concluded, as O'Malley did, that the warrant authorized a search for the materials outlined in the affidavit.

Sheppard contends that since O'Malley knew the warrant form was defective, he should have examined it to make sure that the necessary changes had been made. However, that argument is based on the premise that O'Malley had a duty to disregard the judge's assurances that the requested search would be authorized and the necessary changes would be made. Whatever an officer may be required to do when he

---

out proper consent is 'unreasonable' unless it has been authorized by a valid warrant." *Camara* v. *Municipal Court*, 387 U. S. 523, 528–529 (1967). See *Steagald* v. *United States*, 451 U. S. 204, 211–212 (1981); *Jones* v. *United States*, 357 U. S. 493, 499 (1958). Whether the present case fits into one of those carefully defined classes is a fact-bound issue of little importance since similar situations are unlikely to arise with any regularity.

executes a warrant without knowing beforehand what items are to be seized,[6] we refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested. In Massachusetts, as in most jurisdictions, the determinations of a judge acting within his jurisdiction, even if erroneous, are valid and binding until they are set aside under some recognized procedure. *Streeter* v. *City of Worcester*, 336 Mass. 469, 472, 146 N. E. 2d 514, 517 (1957); *Moll* v. *Township of Wakefield*, 274 Mass. 505, 507, 175 N. E. 81, 82 (1931). If an officer is required to accept at face value the judge's conclusion that a warrant form is invalid, there is little reason why he should be expected to disregard assurances that everything is all right, especially when he has alerted the judge to the potential problems.

In sum, the police conduct in this case clearly was objectively reasonable and largely error-free. An error of constitutional dimensions may have been committed with respect to the issuance of the warrant, but it was the judge, not the police officers, who made the critical mistake. "[T]he exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges." *Illinois* v. *Gates*, 462 U. S. ——, —— (1983) (WHITE, J., concurring in the judgment).[7] Suppressing evidence be-

[6] Normally, when an officer who has not been involved in the application stage receives a warrant, he will read it in order to determine the object of the search. In this case, Detective O'Malley, the officer who directed the search, knew what items were listed in the affidavit presented to the judge, and he had good reason to believe that the warrant authorized the seizure of those items. Whether an officer who is less familiar with the warrant application or who has unalleviated concerns about the proper scope of the seach would be justified in failing to notice a defect like the one in the warrant in this case is an issue we need not decide. We hold only that it was not unreasonable for the police in this case to rely on the judge's assurances that the warrant authorized the search they had requested.

[7] This is not an instance in which "it is plainly evident that a magistrate

cause the judge failed to make all the necessary clerical corrections despite his assurances that such changes would be made will not serve the deterrent function that the exclusionary rule was designed to achieve. Accordingly, federal law does not require the exclusion of the disputed evidence in this case. The judgment of the Supreme Judicial Court is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

---

or judge had no business issuing a warrant." *Illinois* v. *Gates*, 462 U. S., at —— (WHITE, J., concurring in the judgment). The judge's error was not in concluding that a warrant should issue but in failing to make the necessary changes on the form. Indeed, Sheppard admits that if the judge had crossed out the reference to controlled substances, written "see attached affidavit" on the form, and attached the affidavit to the warrant, the warrant would have been valid. Tr. of Oral Arg. 27, 50. See *United States* v. *Johnson*, 690 F. 2d 60, 64–65 (CA3 1982), *cert. denied*, —— U. S. —— (1983); *In re Property Belonging to Talk of the Town Bookstore, Inc.*, 644 F. 2d 1317, 1318–1319 (CA9 1981); *United States* v. *Johnson*, 541 F. 2d 1311, 1315–1316 (CA8 1976); *United States* v. *Womack*, 509 F. 2d 368, 382 (CADC 1974); *Commonwealth* v. *Todisco*, 363 Mass. 445, 450, 294 N. E. 2d 860, 864 (1973).

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SEGURA ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 82–5298. Argued November 9, 1983—Decided July 5, 1984

Acting on information that petitioners probably were trafficking in cocaine from their apartment, New York Drug Enforcement Task Force agents began a surveillance of petitioners. Thereafter, upon observing petitioner Colon deliver a bulky package to one Parra at a restaurant parking lot, while petitioner Segura and one Rivudalla-Vidal visited inside the restaurant, the agents followed Parra and Rivudalla-Vidal to their apartment and stopped them. Parra was found to possess cocaine, and she and Rivudalla-Vidal were immediately arrested. After being advised of his constitutional rights, Rivudalla-Vidal admitted that he had purchased the cocaine from petitioner Segura and confirmed that petitioner Colon had made the delivery at the restaurant. Task Force agents were then authorized by an Assistant United States Attorney to arrest petitioners, and were advised that a search warrant for petitioners' apartment probably could not be obtained until the following day but that the agent should secure the premises to prevent destruction of evidence. Later that same evening, the agents arrested petitioner Segura in the lobby of petitioners' apartment building, took him to the apartment, knocked on the door, and, when it was opened by petitioner Colon, entered the apartment without requesting or receiving permission. The agents then conducted a limited security check of the apartment and in the process observed, in plain view, various drug paraphernalia. Petitioner Colon was then arrested, and both petitioners were taken into custody. Two agents remained in the apartment awaiting the warrant but because of "administrative delay" the search warrant was not issued until some 19 hours after the initial entry into the apartment. In the search pursuant to the warrant, the agents discovered, *inter alia*, cocaine and records of narcotics transactions. These items were seized, together with those observed during the security check. The District

Syllabus

Court granted petitioners' pretrial motion to suppress all the seized evidence. The Court of Appeals held that the evidence discovered in plain view on the initial entry, but not the evidence seized during the warrant search, must be suppressed. Petitioners were subsequently convicted of violating federal drug laws, and the Court of Appeals affirmed.

Held:

1. The exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or "fruit of the poisonous tree." *Nardone* v. *United States*, 308 U. S. 338, 341. The exclusionary rule does not apply, however, if the connection between the illegal police conduct and the discovery and seizure of the evidence is "so attenuated as to dissipate the taint," *ibid.*, as, for example, where the police had an "independent source" for discovery of the evidence. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385. Pp. 7–9.

2. Here, there was an independent source for the challenged evidence; the evidence was discovered during a search of petitioners' apartment pursuant to a valid warrant. The information on which the warrant was secured came from sources wholly unconnected with the initial entry and was known to the agents well before that entry. Hence, whether the initial entry was illegal or not is irrelevant to the admissibility of the evidence, and exclusion of the evidence is not warranted as derivative or as "fruit of the poisonous tree." Pp. 18–21.

697 F. 2d 300, affirmed.

BURGER, C. J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, V, and VI, in which WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined, and an opinion with respect to Part IV, in which O'CONNOR, J., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 82–5298

ANDRES SEGURA AND LUZ MARINA COLON, PETITIONERS *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[July 5, 1984]

THE CHIEF JUSTICE delivered the opinion of the Court.*

We granted certiorari to decide whether, because of an earlier illegal entry, the Fourth Amendment requires suppression of evidence seized later from a private residence pursuant to a valid search warrant which was issued on information obtained by the police before the entry into the residence.

I

Resolution of this issue requires us to consider two separate questions: first, whether the entry and internal securing of the premises constituted an impermissible seizure of all the contents of the apartment, seen and unseen; second, whether the evidence first discovered during the search of the apartment pursuant to a valid warrant issued the day after the entry should have been suppressed as fruit of the illegal entry. Our disposition of both questions is carefully limited.

The Court of Appeals affirmed the District Court's holding that there were no exigent circumstances to justify the warrantless entry into petitioners' apartment. That issue is not before us, and we have no reason to question the courts' holding that that *search* was illegal. The ensuing interference with petitioners' possessory interests in their apartment,

*JUSTICE WHITE, JUSTICE POWELL, and JUSTICE REHNQUIST join all but Part IV of this opinion.

however, is another matter. On this first question, we conclude that, assuming that there was a *seizure* of all the contents of the petitioners' apartment when agents secured the premises from within, that seizure did not violate the Fourth Amendment. Specifically, we hold that where officers, having probable cause, enter premises, and with probable cause, arrest the occupants who have legitimate possessory interests in its contents and take them into custody and, for no more than the period here involved, secure the premises from within to preserve the status quo while others, in good faith, are in the process of obtaining a warrant, they do not violate the Fourth Amendment's proscription against unreasonable seizures.[1] The illegality of the initial entry, as we will show, has no bearing on the second question.

The resolution of this second question requires that we determine whether the initial entry tainted the discovery of the evidence now challenged. On this issue, we hold that the evidence discovered during the subsequent search of the apartment the following day pursuant to the valid search warrant issued wholly on information known to the officers before the entry into the apartment need not have been suppressed as "fruit" of the illegal entry because the warrant and the information on which it was based were unrelated to the entry and therefore constituted an independent source for the evidence under *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920).

II

In January 1981, the New York Drug Enforcement Task Force received information indicating that petitioners Andres Segura and Luz Marina Colon probably were trafficking in cocaine from their New York apartment. Acting on this information, Task Force agents maintained continuing surveillance over petitioners until their arrest on February

[1] See Griswold, Criminal Procedure, 1969—Is It A Means Or An End?, 29 Md. L. Rev. 307, 317 (1969); see generally 2 W. LaFave, Search and Seizure § 6.5 (1978).

12, 1981. On February 9, agents observed a meeting between Segura and Enrique Rivudalla-Vidal, during which, as it later developed, the two discussed the possible sale of cocaine by Segura to Rivudalla-Vidal. Three days later, February 12, Segura telephoned Rivudalla-Vidal and agreed to provide him with cocaine. The two agreed that the delivery would be made at 5 p. m. that day at a designated fast-food restaurant in Queens, N. Y. Rivudalla-Vidal and one Esther Parra, arrived at the restaurant at 5 p. m., as agreed. While Segura and Rivudalla-Vidal visited inside the restaurant, agents observed Luz Marina Colon deliver a bulky package to Parra, who had remained in Rivudalla-Vidal's car in the restaurant parking lot. A short time after the delivery of the package, Rivudalla-Vidal and Parra left the restaurant and proceeded to their apartment. Task Force agents followed. The agents stopped the couple as they were about to enter Rivudalla-Vidal's apartment. Parra was found to possess cocaine; both Rivudalla-Vidal and Parra were immediately arrested.

After Rivudalla-Vidal and Parra were advised of their constitutional rights, Rivudalla-Vidal agreed to cooperate with the agents. He admitted that he had purchased the cocaine from Segura and he confirmed that Colon had made the delivery at the fast-food restaurant earlier that day, as the agents had observed. Rivudalla-Vidal informed the agents that Segura was to call him at approximately 10 o'clock that evening to learn if Rivudalla-Vidal had sold the cocaine, in which case Segura was to deliver additional cocaine.

Between 6:30 and 7 p. m., the same day, Task Force agents sought and received authorization from an Assistant United States Attorney to arrest Segura and Colon. The agents were advised by the Assistant United States Attorney that because of the lateness of the hour, a search warrant for petitioners' apartment probably could not be obtained until the following day, but that the agents should proceed to secure the premises to prevent the destruction of evidence.

At about 7:30 p. m., the agents arrived at petitioners' apartment and established external surveillance. At 11:15 p. m., Segura, alone, entered the lobby of the apartment building where he was immediately arrested by agents. He first claimed he did not reside in the building. The agents took him to his third floor apartment, and when they knocked on the apartment door, a woman later identified as Luz Colon appeared; the agents then entered with Segura, without requesting or receiving permission. There were three persons in the living room of the apartment in addition to Colon. Those present were informed by the agents that Segura was under arrest and that a search warrant for the apartment was being obtained.

Following this brief exchange in the living room, the agents conducted a limited security check of the apartment to ensure that no one else was there who might pose a threat to their safety or destroy evidence. In the process, the agents observed, in a bedroom in plain view, a triple-beam scale, jars of lactose, and numerous small cellophane bags, all accouterments of drug trafficking. None of these items was disturbed by the agents. After this limited security check, Luz Colon was arrested. In the search incident to her arrest, agents found in her purse a loaded revolver and more than $2,000 in cash. Colon, Segura, and the other occupants of the apartment were taken to Drug Enforcement Administration headquarters.

Two Task Force agents remained in petitioners' apartment awaiting the warrant. Because of what is characterized as "administrative delay" the warrant application was not presented to the magistrate until 5 p. m. the next day. The warrant was issued and the search was performed at approximately 6 p. m., some 19 hours after the agents' initial entry into the apartment. In the search pursuant to the warrant, agents discovered almost three pounds of cocaine, 18 rounds of .38-caliber ammunition fitting the revolver agents had found in Luz Colon's possession at the time of her arrest,

more than $50,000 cash, and records of narcotics transactions. Agents seized these items, together with those observed during the security check the previous night.

Before trial in the United States District Court in the Eastern District of New York, petitioners moved to suppress all of the evidence seized from the apartment—the items discovered in plain view during the initial security check and those not in plain view first discovered during the subsequent warrant search.[2] After a full evidentiary hearing, the District Court granted petitioners' motion. The court ruled that there were no exigent circumstances justifying the initial entry into the apartment. Accordingly, it held that the entry, the arrest of Colon and search incident to her arrest, and the effective seizure of the drug paraphernalia in plain view were illegal. The District Court ordered this evidence suppressed as "fruits" of illegal searches.

The District Court held that the warrant later issued was supported by information sufficient to establish probable cause; however, it read *United States* v. *Griffin*, 502 F. 2d 959 (CA6), cert. denied, 419 U. S. 1050 (1974), as requiring suppression of the evidence seized under the valid warrant.[3] The District Court reasoned that this evidence would not necessarily have been discovered because, absent the illegal

---

[2] Rivudalla-Vidal and Parra were indicted with petitioners and were charged with one count of possession with intent to distribute one-half kilogram of cocaine on one occasion and one kilogram on another occasion. Both pled guilty to the charges. They moved in the District Court to suppress the one-half kilogram of cocaine found on Parra's person at the time of their arrests on the ground that the Task Force agents had stopped them in violation of *Terry* v. *Ohio*, 392 U. S. 1 (1968). The court denied the motion. Rivudalla-Vidal and Parra absconded prior to sentencing by the District Court.

[3] In *Griffin*, absent exigent circumstances, police officers forcibly entered an apartment and discovered in plain view narcotics and related paraphernalia. The entry took place while other officers sought a search warrant. The Court of Appeals for the Sixth Circuit affirmed the District Court's grant of the defendant's suppression motion.

entry and "occupation" of the apartment, Colon might have arranged to have the drugs removed or destroyed, in which event they would not have been in the apartment when the warrant search was made. Under this analysis, the District Court held that even the drugs seized under the valid warrant were "fruit of the poisonous tree."

On an appeal limited to the admissibility of the incriminating evidence, the Court of Appeals affirmed in part and reversed in part. 663 F. 2d 411 (1981). It affirmed the District Court holding that the initial warrantless entry was not justified by exigent circumstances and that the evidence discovered in plain view during the initial entry must be suppressed.[4] The Court of Appeals rejected the argument advanced by the United States that the evidence in plain view should not be excluded because it was not actually "seized" until after the search warrant was secured.

Relying upon its holding in *United States* v. *Agapito*, 620 F. 2d 324 (CA2), cert. denied, 449 U. S. 834 (1980),[5] the

[4] Both the District Court and the Court of Appeals held that the initial entry into the apartment was not justified by exigent circumstances, and thus that the items discovered in plain view during the limited security check had to be suppressed to effect the purposes of the Fourth Amendment. The United States, although it does not concede the correctness of this holding, does not contest it in this Court. Because the government has decided not to press its argument that exigent circumstances existed, we need not and do not address this aspect of the Court of Appeals decision. We are concerned only with whether the Court of Appeals properly determined that the Fourth Amendment did not require suppression of the evidence seized during execution of the valid warrant.

[5] In *Agapito*, DEA agents, following a two-day surveillance of the defendant's hotel room, arrested the suspected occupants of the room in the lobby of the hotel. After the arrests, the agents entered the hotel room and remained within, with the exception of periodic departures, for almost 24 hours until a search warrant issued. During their stay in the room, the agents seized but did not open a suitcase found in the room. In the search pursuant to the warrant, the agents found cocaine in the suitcase. Although the Second Circuit held that the initial entry was illegal, it held that the cocaine need not be suppressed because it was discovered in the search under the valid warrant.

Court of Appeals reversed the District Court's holding requiring suppression of the evidence seized under the valid warrant executed on the day following the initial entry. The Court of Appeals described as "prudentially unsound" the District Court's decision to suppress that evidence simply because it could have been destroyed had the agents not entered.

Petitioners were convicted of conspiring to distribute cocaine, in violation of 21 U. S. C. § 846, and of distributing and possessing with intent to distribute cocaine, in violation of 21 U. S. C. § 841(a)(1). On the subsequent review of these convictions, the Second Circuit affirmed, rejecting claims by petitioners that the search warrant was procured through material misrepresentations and that the evidence at trial was insufficient as a matter of law to support their convictions. We granted certiorari, 459 U. S. 1200 (1983), and we affirm.

III

At the outset, it is important to focus on the narrow and precise question now before us. As we have noted, the Court of Appeals agreed with the District Court that the initial warrantless entry, and the limited security search were not justified by exigent circumstances and were therefore illegal. No review of that aspect of the case was sought by the Government and no issue concerning items observed during the initial entry is before the Court. The only issue here is whether drugs and the other items not observed during the initial entry and first discovered by the agents the day after the entry, under an admittedly valid search warrant, should have been suppressed.

The suppression or exclusionary rule is a judicially prescribed remedial measure and as "with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, 414 U. S. 338, 348 (1974). Under this Court's holdings, the exclusionary rule

reaches not only primary evidence obtained as a direct result of an illegal search or seizure, *Weeks* v. *United States*, 232 U. S. 383 (1914), but also evidence later discovered and found to be derivative of an illegality or "fruit of the poisonous tree." *Nardone* v. *United States*, 308 U. S. 338, 341 (1939). It "extends as well to the indirect as the direct products" of unconstitutional conduct. *Wong Sun* v. *United States*, 371 U. S. 471, 484 (1963).

Evidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion. The question to be resolved when it is claimed that evidence subsequently obtained is "tainted" or is "fruit" of a prior illegality is whether the challenged evidence was

> "'come at by exploitation of [the initial] illegality or instead by means *sufficiently distinguishable* to be purged of the primary taint.'" *Id.*, at 488 (citation omitted; emphasis added).

It has been well established for more than 60 years that evidence is not to be excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is "so attenuated as to dissipate the taint," *Nardone* v. *United States*, *supra*, at 341. It is not to be excluded, for example, if police had an "independent source" for discovery of the evidence:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. *If knowledge of them is gained from an independent source they may be proved like any others.*" *Silverthorne Lumber Co.* v. *United States*, 251 U. S., at 392 (emphasis added).

In short, it is clear from our prior holdings that "the exclusionary rule has no application [where] the Government

learned of the evidence 'from an independent source.'" *Wong Sun*, *supra*, at 487 (quoting *Silverthorne Lumber Co.*, *supra*, at 392); see also *United States* v. *Crews*, 445 U. S. 463 (1980); *United States* v. *Wade*, 388 U. S. 218, 242 (1967); *Costello* v. *United States*, 365 U. S. 265, 278–280 (1961).

IV

A

Petitioners argue that all of the contents of the apartment, seen and not seen, including the evidence now in question, were "seized" when the agents entered and remained on the premises while the lawful occupants were away from the apartment in police custody. The essence of this argument is that because the contents were then under the control of the agents and no one would have been permitted to remove the incriminating evidence from the premises or destroy it, a "seizure" took place. Plainly, this argument is advanced to avoid the *Silverthorne* "independent source" exception. If all the contents of the apartment were "seized" at the time of the illegal entry, presumably the evidence now challenged would be suppressible as primary evidence obtained as a direct result of that entry.

We need not decide whether, when the agents entered the apartment and secured the premises, they effected a seizure of the cocaine, the cash, the ammunition, and the narcotics records within the meaning of the Fourth Amendment. By its terms, the Fourth Amendment forbids only "unreasonable" searches and seizures. Assuming, *arguendo*, that the agents seized the entire apartment and its contents, as petitioners suggest, the seizure was not unreasonable under the totality of the circumstances.

Different interests are implicated by a seizure than by a search. *United States* v. *Jacobsen*, 466 U. S. ——, —— (1984); *Texas* v. *Brown*, 460 U. S. ——, (1983); *id.*, at —— (STEVENS, J., concurring in judgment); *United States* v. *Chadwick*, 433 U. S. 1, 13–14, n. 8 (1977); *Chambers* v.

Maroney, 399 U. S. 42, 51–52 (1970). A seizure affects only the person's possessory interests; a search affects a person's privacy interests. *United States* v. *Jacobsen*, *supra*, at ——; *United States* v. *Chadwick*, *supra*, at 13–14, n. 8; see generally *Texas* v. *Brown*, *supra* (concurring opinion). Recognizing the generally less intrusive nature of a seizure, *Chadwick*, *supra*, at 13–14, n. 8; *Chambers* v. *Maroney*, *supra*, at 51, the Court has frequently approved warrantless seizures of property, on the basis of probable cause, for the time necessary to secure a warrant, where a warrantless search was either held to be or likely would have been held impermissible. *Chambers* v. *Maroney*, *supra*; *United States* v. *Chadwick*, *supra*; *Arkansas* v. *Sanders*, 442 U. S. 753 (1979).[6]

We focused on the issue notably in *Chambers*, holding that it was reasonable to seize and impound an automobile, on the

[6] In two instances, the Court has allowed temporary seizures and limited detentions of property based upon less than probable cause. In *United States* v. *Van Leeuwen*, 397 U. S. 249 (1970), the Court refused to invalidate the seizure and detention—on the basis of only reasonable suspicion—of two packages delivered to a United States Post Office for mailing. One of the packages was detained on mere suspicion for only 1½ hours; by the end of that period enough information had been obtained to establish probable cause that the packages contained stolen coins. But the other package was detained for 29 hours before a search warrant was finally served. Both seizures were held reasonable. In fact, the Court suggested that both seizures and detentions for these "limited times" were "prudent" under the circumstances.

Only last Term, in *United States* v. *Place*, 462 U. S. —— (1983), we considered the validity of a brief seizure and detention of a traveler's luggage, on the basis of a reasonable suspicion that the luggage contained contraband; the purpose of the seizure and brief detention were to investigate further the causes for the suspicion. Although we held that the 90-minute detention of the luggage in the airport was, under the circumstances, unreasonable, we held that the rationale of *Terry* v. *Ohio*, 392 U. S. 1 (1968), applies to permit an officer, on the basis of reasonable suspicion that a traveler is carrying luggage containing contraband, to seize and detain the luggage briefly to "investigate the circumstances that aroused his suspicion." 462 U. S., at ——.

basis of probable cause, for "whatever period is necessary to obtain a warrant for the search." 399 U. S., at 51 (footnote omitted). We acknowledged in *Chambers* that following the car until a warrant could be obtained was an alternative to impoundment, albeit an impractical one. But we allowed the seizure nonetheless because otherwise the occupants of the car could have removed the "instruments or fruits of crime" before the search. *Id.*, at 51, n. 9. The Court allowed the warrantless seizure to protect the evidence from destruction even though there was no immediate fear that the evidence was in the process of being destroyed or otherwise lost. The *Chambers* Court declared:

> "For constitutional purposes, we see no difference between on the one hand seizing and holding the car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. *Given probable cause to search, either course is reasonable under the Fourth Amendment.*" *Id.*, at 52 (emphasis added)

In *Chadwick*, we held that the warrantless *search* of the footlocker after it had been seized and was in a secure area of the Federal Building violated the Fourth Amendment's proscription against unreasonable searches, but neither the respondents nor the Court questioned the validity of the initial warrantless *seizure* of the footlocker on the basis of probable cause. The seizure of Chadwick's footlocker clearly interfered with his use and possession of the footlocker—his possessory interest—but we held that this did not "diminish [his] legitimate expectation that the footlocker's *contents* would remain private." 433 U. S., at 13–14, n. 8 (emphasis added). And again, in *Arkansas* v. *Sanders*, *supra*, we held that absent exigent circumstances a warrant was required to search luggage seized from an automobile which was already in the possession and control of police at the time of the search. However, we expressly noted that the police acted not only "properly," but "commendably" in seizing the suitcase with-

out a warrant on the basis of probable cause to believe that it contained drugs. 442 U. S., at 761. The taxi into which the suitcase had been placed was about to drive away. However, just as there was no immediate threat of loss or destruction of evidence in *Chambers*—since officers could have followed the car until a warrant issued—so too in *Sanders* officers could have followed the taxicab. Indeed, there arguably was even less fear of immediate loss of the evidence in *Sanders* because the suitcase at issue had been placed in the vehicle's trunk, thus rendering immediate access unlikely before police could act.

Underlying these decisions is a belief that society's interest in the discovery and protection of incriminating evidence from removal or destruction can supersede, at least for a limited period, a person's possessory interest in property, provided that there is probable cause to believe that that property is associated with criminal activity. See *United States* v. *Place*, 462 U. S. —— (1983).

The Court has not had occasion to consider whether, when officers have probable cause to believe that evidence of criminal activity is on the premises, the temporary securing of a dwelling to prevent the removal or destruction of evidence violates the Fourth Amendment. However, in two cases we have suggested that securing of premises under these circumstances does not violate the Fourth Amendment, at least when undertaken to preserve the *status quo* while a search warrant is being sought. In *Mincey* v. *Arizona*, 437 U. S. 385 (1978), we noted with approval that, to preserve evidence, a police guard had been stationed at the entrance to an apartment in which a homicide had been committed, even though "[t]here was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant." *Id.*, at 394. Similarly, in *Rawlings* v. *Kentucky*, 448 U. S. 98 (1980), although officers secured, from within, the home of a person for whom they had an arrest warrant, and detained all occupants while other officers

were obtaining a search warrant, the Court did not question the admissibility of evidence discovered pursuant to the warrant later issued.[7]

We see no reason, as *Mincey* and *Rawlings* would suggest, why the same principle applied in *Chambers*, *Chadwick*, and *Sanders*, should not apply where a dwelling is involved. The sanctity of the home is not to be disputed. But the home is sacred in Fourth Amendment terms not primarily because of the occupants' *possessory* interests in the premises, but because of their *privacy* interests in the activities that take place within. "[T]he Fourth Amendment protects people, not places." *Katz* v. *United States*, 389 U. S. 347, 351 (1967); see also *Payton* v. *New York*, 445 U. S. 573, 615 (1980) (WHITE, J., dissenting).

As we have noted, however, a seizure affects only possessory interests, not privacy interests. Therefore, the height-

---

stitutional scholar raised the question whether a
ght not be appropriate to preserve the status quo
vidence while police officers in good faith

real practical problem. Does the police
ain the status quo while he, or a colleague

[7] A distinguished constitutional scholar raised the question whether a seizure of premises might not be appropriate to preserve the status quo and protect valuable evidence while police officers in good faith seek a warrant.

"Here there is a very real practical problem. Does the police officer have any power to maintain the status quo while he, or a colleague of his, is taking the time necessary to draw up a sufficient affidavit to support an application for a search warrant, and then finding a magistrate, submitting the application to him, obtaining the search warrant if it is issued, and then bringing it to the place where the arrest was made. It seems inevitable that a minimum of several hours will be required for this process, at the very best. *Unless there is some kind of a power to prevent removal of material from the premises, or destruction of material during this time, the search warrant will almost inevitably be fruitless.*" Griswold, Criminal Procedure, 1969—Is It A Means Or An End?, 29 Md. L. Rev. 307, 317 (1969) (emphasis added).

Justice Black posed essentially the same question in his dissent in *Vale* v. *Louisiana*, 399 U. S. 30, 36 (1970). After pointing out that Vale's arrest just outside his residence was "plainly visible to anyone within the house, and the police had every reason to believe that someone in the house was likely to destroy the contraband if the search were postponed," he noted:

"This case raises most graphically the question how does a policeman protect evidence necessary to the State if he must leave the premises

ened protection we accord privacy interests is simply not implicated where a *seizure* of premises, not a search, is at issue. We hold, therefore, that securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents. We reaffirm at the same time, however, that, absent exigent circumstances, a warrantless search—such as that invalidated in *Vale* v. *Louisiana*, *supra*, at 33–34—is illegal.

Here, the agents had abundant probable cause in advance of their entry to believe that there was a criminal drug operation being carried on in petitioners' apartment; indeed petitioners do not dispute the probable cause determination. The agents had maintained surveillance over petitioners for weeks, and had observed petitioners leave the apartment to make sales of cocaine. Wholly apart from observations made during that extended surveillance, Rivudalla-Vidal had told agents after his arrest on February 13, that petitioners had supplied him with cocaine earlier that day, that he had not purchased all of the cocaine offered by Segura, and that Segura probably had more cocaine in the apartment. On the basis of this information, a magistrate duly issued a search warrant, the validity of which was upheld by both the District Court and the Court of Appeals, and which is not before us now.

In this case, the agents entered and secured the apartment from within. Arguably, the wiser course would have been to depart immediately and secure the premises from the outside by a "stakeout" once the security check revealed that no one other than those taken into custody were in the apartment. But the method actually employed does not require a differ-

---

to get a warrant, allowing the evidence he seeks to be destroyed. The Court's answer to that question makes unnecessarily difficult the conviction of those who prey upon society." *Id.*, at 41.

ent result under the Fourth Amendment, insofar as the *seizure* is concerned. As the Court of Appeals held, absent exigent circumstances, the entry may have constituted an illegal *search*, or interference with petitioners' privacy interests, requiring suppression of all evidence observed during the entry. Securing of the premises from within, however, was no more an interference with the petitioners' possessory interests in the contents of the apartment than a perimeter "stakeout." In other words, the initial entry—legal or not—does not affect the reasonableness of the seizure. Under either method—entry and securing from within or a perimeter stakeout—agents control the apartment pending arrival of the warrant; both an internal securing and a perimeter stakeout interfere to the same extent with the possessory interests of the owners.

Petitioners argue that we heighten the possibility of illegal entries by a holding that the illegal entry and securing of the premises from the inside do not themselves render the *seizure* any more unreasonable than had the agents staked out the apartment from the outside. We disagree. In the first place, an entry in the absence of exigent circumstances is illegal. We are unwilling to believe that officers will routinely and purposely violate the law as a matter of course. Second, as a practical matter, officers who have probable cause and who are in the process of obtaining a warrant have no reason to enter the premises before the warrant issues, absent exigent circumstances which, of course, would justify the entry. *United States* v. *Santana*, 427 U. S. 38 (1976); *Johnson* v. *United States*, 333 U. S. 10 (1948). Third, officers who enter illegally will recognize that whatever evidence they discover as a direct result of the entry may be suppressed, as it was by the Court of Appeals in this case. Finally, if officers enter without exigent circumstances to justify the entry, they expose themselves to potential civil liability under 42

U. S. C. § 1983. *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388 (1971).

Of course, a seizure reasonable at its inception because based upon probable cause may become unreasonable as a result of its duration or for other reasons. Cf. *United States* v. *Place*, *supra*. Here, because of the delay in securing the warrant, the occupation of the apartment continued throughout the night and into the next day. Such delay in securing a warrant in a large metropolitan center unfortunately is not uncommon; this is not, in itself, evidence of bad faith. And there is no suggestion that the officers, in bad faith, purposely delayed obtaining the warrant. The asserted explanation is that the officers focused first on the task of processing those whom they had arrested before turning to the task of securing the warrant. It is not unreasonable for officers to believe that the former should take priority, given, as was the case here, that the proprietors of the apartment were in the custody of the officers throughout the period in question.

There is no evidence that the agents in any way exploited their presence in the apartment; they simply awaited issuance of the warrant. Moreover, more than half of the 19-hour delay was between 10 p. m. and 10 a. m. the following day, when it is reasonable to assume that judicial officers are not as readily available for consideration of warrant requests. Finally, and most important, we observed in *United States* v. *Place*, *supra*, at ——, that

> "[t]he intrusion on possessory interests occasioned by a seizure . . . can vary both in its nature and extent. The seizure may be made after the owner has relinquished control of the property to a third party or . . . from the immediate custody and control of the owner."

Here, of course, Segura and Colon, whose possessory interests were interfered with by the occupation, were under ar-

rest and in the custody of the police throughout the entire period the agents occupied the apartment. The actual interference with their possessory interests in the apartment and its contents was, thus, virtually nonexistent. Cf. *United States* v. *Van Leeuwen*, 397 U. S. 249 (1970). We are not prepared to say under these limited circumstances that the seizure was unreasonable under the Fourth Amendment.[8]

V

Petitioners also argue that even if the evidence was not subject to suppression as primary evidence "seized" by virtue of the initial illegal entry and occupation of the premises, it should have been excluded as "fruit" derived from that illegal entry. Whether the initial entry was illegal or not is irrelevant to the admissibility of the challenged evidence because there was an independent source for the warrant under which that evidence was seized. Exclusion of evidence as derivative or "fruit of the poisonous tree" is not warranted here because of that independent source.

None of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioners' apartment; the information came from sources wholly unconnected with the entry and was known to the agents well before the initial entry. No information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant. It is therefore beyond dispute that the information possessed by the agents before they entered the apartment constituted an independent source for the discovery and seizure of the evi-

[8] Our decision in *United States* v. *Place*, 462 U. S. —— (1983), is not inconsistent with this conclusion. There, we found unreasonable a 90-minute detention of a traveler's luggage. But the detention was based only on a suspicion that the luggage contained contraband, not on probable cause. After probable cause was established, authorities held the unopened luggage for almost three days before a warrant was obtained. It was not suggested that this delay presented an independent basis for suppression of the evidence eventually discovered.

dence now challenged. This evidence was discovered the day following the entry, during the search conducted under a valid warrant; it was the product of that search, wholly unrelated to the prior entry. The valid warrant search was a "means sufficiently distinguishable" to purge the evidence of any "taint" arising from the entry. *Wong Sun*, 371 U. S., at 488.[9] Had police never entered the apartment, but instead conducted a perimeter stakeout to prevent anyone from entering the apartment and destroying evidence, the contraband now challenged would have been discovered and seized precisely as it was here. The legality of the initial entry is, thus, wholly irrelevant under *Wong Sun*, *supra*, and *Silverthorne*, *supra*.[10]

Our conclusion that the challenged evidence was admissible is fully supported by our prior cases going back more than a half century. The Court has never held that evidence is "fruit of the poisonous tree" simply because "it would not have come to light but for the illegal actions of the police." See *Wong Sun*, *supra*, at 487–488; *Rawlings* v. *Kentucky*, 448 U. S. 98 (1980); *Brown* v. *Illinois*, 422 U. S. 590, 599 (1975). That would squarely conflict with *Silverthorne* and our other cases allowing admission of evidence, notwith-

[9] Our holding in this respect is consistent with the vast majority of federal courts of appeals which have held that evidence obtained pursuant to a valid warrant search need not be excluded because of a prior illegal entry. See, *e. g.*, *United States* v. *Perez*, 700 F. 2d 1232 (CA8 1983); *United States* v. *Kinney*, 638 F. 2d 941 (CA6), cert. denied, 452 U. S. 918 (1981); *United States* v. *Fitzharris*, 633 F. 2d 416 (CA5 1980), cert. denied, 451 U. S. 988 (1981); *United States* v. *Agapito*, 620 F. 2d 324 (CA2 1980); *United States* v. *Bosby*, 675 F. 2d 1174 (CA11 1982) (dictum). The only federal court of appeals to hold otherwise is the Ninth Circuit. See *United States* v. *Lomas*, 706 F. 2d 886 (1983); *United States* v. *Allard*, 634 F. 2d 1182 (1980).

[10] It is important to note that the dissent stresses the legal status of the agents' initial entry and occupation of the apartment; however, this case involves only evidence seized in the search made subsequently under a valid warrant. Implicit in the dissent is that the agents' presence in the apartment denied petitioners some legal "right" to arrange to have the incriminating evidence concealed or destroyed.

standing a prior illegality, when the link between the illegality and that evidence was sufficiently attenuated to dissipate the taint. By the same token, our cases make clear that evidence will not be excluded as "fruit" unless the illegality is at least the "but for" cause of the discovery of the evidence. Suppression is not justified unless "the challenged evidence is in some sense the product of illegal governmental activity." *United States* v. *Crews*, 445 U. S., at 471. The illegal entry into petitioners' apartment did not contribute in any way to discovery of the evidence seized under the warrant; it is clear, therefore, that not even the threshold "but for" requirement was met in this case.

The dissent contends that the initial entry and securing of the premises are the "but for" causes of the discovery of the evidence in that, had the agents not entered the apartment, but instead secured the premises from the outside, Colon or her friends if alerted, could have removed or destroyed the evidence before the warrant issued. While the dissent embraces this "reasoning," petitioners do not press this argument. The Court of Appeals rejected this argument as "prudentially unsound" and because it rested on "wholly speculative assumptions." Among other things, the Court of Appeals suggested that, had the agents waited to enter the apartment until the warrant issued, they might not have decided to take Segura to the apartment and thereby alert Colon. Or, once alerted by Segura's failure to appear, Colon might have attempted to remove the evidence, rather than destroy it, in which event the agents could have intercepted her and the evidence.

We agree fully with the Court of Appeals that the District Court's suggestion that Colon and her cohorts would have removed or destroyed the evidence was pure speculation. Even more important, however, we decline to extend the exclusionary rule, which already exacts an enormous price from society and our system of justice, to further "protect" criminal activity, as the dissent would have us do.

It may be that, if the agents had not entered the apartment, petitioners might have arranged for the removal or destruction of the evidence, and that in this sense the agents' actions could be considered the "but for" cause for discovery of the evidence. But at this juncture, we are reminded of Justice Jackson's warning that "[s]ophisticated argument may prove a causal connection between information obtained through [illegal conduct] and the Government's proof," and his admonition that the courts should consider whether "[a]s a matter of good sense . . . such connection may have become so attenuated as to dissipate the taint." *Nardone*, 308 U. S., at 341. The essence of the dissent is that there is some "constitutional right" to destroy evidence. This concept defies both logic and common sense.

VI

We agree with the Court of Appeals that the cocaine, cash records and ammunition were properly admitted into evidence. Accordingly, the judgment is affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 82–5298

ANDRES SEGURA AND LUZ MARINA COLON, PETITIONERS *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[July 5, 1984]

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

Correct analysis of the Fourth Amendment issues raised by this case requires, first, a precise identification of the two constitutional violations that occurred, and second, an explanation of why a remedy for both is appropriate. While I do not believe that the current record justifies suppression of the challenged evidence, neither does it justify affirmance of petitioners' convictions. We must consider the substantial contention, supported by the findings of the District Court and left unaddressed by the opinion of this Court, that the authorities' access to the evidence introduced against petitioners at trial was made possible only through exploitation of both constitutional violations. Because I believe that contention must be addressed before petitioners' convictions are finally affirmed, I would remand for further proceedings. The Court's disposition, I fear, will provide government agents with an affirmative incentive to engage in unconstitutional violations of the privacy of the home. The Court's disposition is, therefore, inconsistent with a primary purpose of the Fourth Amendment's exclusionary rule—to ensure that all private citizens—not just these petitioners—have some meaningful protection against future violations of their rights.

I

The events that occurred on February 12 and 13, 1981, were the culmination of an investigation of petitioners that had been underway for over two weeks. On the evening of February 12, agents of the New York Drug Enforcement Task Force arrested Rivadulla and Parra, who told them that Segura probably had cocaine in his apartment. At that point, the agents concluded that they had probable cause to search petitioners' apartment, and contacted the United States Attorney's office. An Assistant United States Attorney informed the agents that at that hour, 6:30 p. m., it was too late to obtain a search warrant, and advised them instead to go to the apartment, arrest Segura, and "secure the premises" pending the issuance of a warrant.[1] The agents arrived at the apartment about an hour later and positioned themselves on a fire escape, where they could observe anyone entering or leaving the apartment. They also put their ears to the door, but heard nothing.[2] After three hours of

[1] THE CHIEF JUSTICE seems to think that this problem was caused by the unavailability of a magistrate to issue a warrant at this hour, *ante*, at 16. However, as the Government candidly admits, the fault here lies not with the judiciary, but with the United States Attorney's office for failing to exercise due diligence in attempting to procure a warrant. One of the agents testified that the Assistant United States Attorney told him only that "*perhaps* a Magistrate could not be found at that particular time in the evening." Tr. 154 (emphasis supplied). The Assistant United States Attorney testified that he did not even attempt to locate a magistrate or obtain a search warrant. Tr. 441–442. As the Government concedes in its brief:

"It is not clear why a greater effort was not made to obtain a search warrant when the officers first sought one, and we do not condone the failure to do so . . . . We note that, subsequent to the events in this case, the United States Attorney circulated an internal memorandum reemphasizing that search warrants should be sought when at all possible, regardless of the hour, in order to avoid the need for warrantless entries to secure premises." Brief for the United States 40, n. 23.

[2] Based on the information they had been given prior to their arrival at the apartment, the agents believed, correctly as it turned out, that Segura was not in the apartment. Tr. 394.

waiting, the agents left their perch and went outside the building, where they continued waiting for Segura to show up. The District Court described what followed:

> "Around 11:15 p. m. Segura appeared, and as he began to enter the locked door at the lobby, he was apprehended, and placed in handcuffs under arrest. The agents, led by Shea, informed him that they wanted to go upstairs to 3D, or in that apartment. Forcibly bringing him to the third floor, the agents began down the hallway, at which point Segura again resisted. Shea again forced him down the hallway to the door of 3D, an apartment which is located in the rear of the building, with no view of the front of the building where the arrest took place. Shea knocked on the door of 3D, with Segura standing, handcuffed, in front of him. Luz Colon, unknown to Shea at the time as such, opened the door. Detective Shea, without more, walked into the apartment with Segura in custody. He was then followed by two other agents, and five minutes later, by Palumbo. Neither Shea nor any other agent had an arrest warrant, or a search warrant. Nor did any of the officers ask for or receive consent to enter apartment 3D." App. 10–11.

The agents arrested Colon and three other persons found in the apartment. Colon was unknown to the agents at the time.[3] The agents made a cursory search of the apartment and saw various items of narcotics paraphanalia in plain view.[4] The agents left that evidence—the "pre-warrant evidence"—in the apartment, but they took the arrestees to headquarters.

At least two of the agents spent the night in the apartment and remained in it thoughout the following day while their colleagues booked the arrestees and presumably persevered in their efforts to obtain a warrant to search the apartment.

---

[3] Tr. 366, 392.

[4] However, none of this evidence could be seen until after the agents had entered the apartment. Tr. 405.

Finally, at 6 p. m. on February 13, the remaining agents were informed that a search warrant had just been issued, and at that point they conducted a thorough search. The District Court concluded: "There was thus a lapse of some 18–20 hours from the entry into the apartment to the execution of the search warrant, during which time the officers remained inside the apartment and in complete control of it." App. 11. Upon searching the apartment the agents found one kilo of cocaine, over $50,000, several rounds of .38 caliber ammunition, and records of narcotics transactions.

II

The Court frames the appropriate inquiry in this case as whether the evidence obtained when the search warrant was executed was a "fruit" of illegal conduct. *Ante*, at 7–8. As a predicate to that inquiry, the illegal conduct must, of course, be identified.

The District Court found that no exigent circumstances justified the agents' initial warrantless entry into petitioners' apartment. App. 11–13. The Court of Appeals affirmed this finding, and the Government did not seek review of it by this Court. Thus, it is uncontested that the warrantless entry of petitioners' apartment was unconstitutional.[5] It is equally clear that the subsequent 18–20 hour occupation of the apartment was independently unconstitutional for two separate reasons.

First, the occupation was an unreasonable "search" within the meaning of the Fourth Amendment. A "search" for purposes of the Fourth Amendment occurs when a reasonable

[5] In *Vale* v. *Louisiana*, 399 U. S. 30 (1970), we held that absent a demonstrable threat of imminent destruction of evidence, the authorities may not enter a residence in order to preserve that evidence without a warrant. See also *United States* v. *Jeffers*, 342 U. S. 48, 51–52 (1951); *McDonald* v. *United States*, 335 U. S. 451, 454–455 (1948); *Johnson* v. *United States*, 333 U. S. 10, 13–15 (1948). The illegality is even more plain in this case because the entry was effected by force late at night.

expectation of privacy is infringed.[6] Nowhere are expectations of privacy greater than in the home. As the Court has repeatedly noted, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States* v. *United States District Court*, 407 U. S. 297, 313 (1972).[7] Of course, the invasion of privacy occasioned by a physical entry does not cease after the initial entry. In *Mincey* v. *Arizona*, 437 U. S. 385 (1978), we held that although the police lawfully entered Mincey's home to arrest him, the Constitution forbade them from remaining in the home and searching it. The Court reasoned that despite the lawful initial entry, Mincey retained a constitutionally protected privacy interest in his home that could not be infringed without a warrant. See *id.*, at 390–391. Similarly, in *Chimel* v. *California*, 395 U. S. 752 (1969), we could "see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require." *Id.*, at 766–767, n. 12.[8] Here, by remaining in the home after the initial en-

[6] See *Oliver* v. *United States*, 466 U. S. ——, —— (1984); *Illinois* v. *Andreas*, 463 U. S. ——, —— (1983); *United States* v. *Knotts*, 460 U. S. ——, —— (1983); *Smith* v. *Maryland*, 442 U. S. 735, 739–741 (1979); *Terry* v. *Ohio*, 392 U. S. 1, 9 (1968).

[7] See also, *e. g.*, *Welsh* v. *Wisconsin*, 466 U. S. ——, —— (1984); *Michigan* v. *Clifford*, 464 U. S. ——, —— (1984) (plurality opinion); *Steagald* v. *United States*, 451 U. S. 204, 212 (1981); *Payton* v. *New York*, 445 U. S. 573, 583–590 (1980); *Coolidge* v. *New Hampshire*, 403 U. S. 443, 481 (1971); *McDonald* v. *United States*, 335 U. S. 451, 455–456 (1948); *Johnson* v. *United States*, 333 U. S. 10, 13–14 (1948).

[8] See also 395 U. S., at 764–765:

"It is argued in the present case that it is 'reasonable' to search a man's house when he is arrested in it. But that argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment pro-

try, the agents exacerbated the invasion of petitioners' protected privacy interests. Even assuming the most innocent of motives, the agents' occupation of petitioners' living quarters inevitably involved scrutiny of a variety of personal effects throughout the apartment.[9] Petitioners' privacy interests were unreasonably infringed by the agents' prolonged occupation of their home. THE CHIEF JUSTICE simply ignores this point, assuming that there is no constitutional distinction between surveillance of the home from the outside and physical occupation from the inside. THE CHIEF JUSTICE's assumption is, of course, untenable; there is a fundamental difference when there is a

> "breach of the entrance to an individual's home. The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone which finds its roots in clear and specific constitutional terms: 'The right of the people to be secure in their . . . houses . . . shall not be violated.'" *Payton* v. *New York*, 445 U. S. 573, 589 (1980).

Second, the agents' occupation was also an unreasonable "seizure" within the meaning of the Fourth Amendment. A "seizure" occurs when there is some meaningful interference with an individual's possessory interests.[10] There can be no doubt here that petitioners' possessory interests with respect

---

tection in this area would approach the evaporation point. It is not easy to explain why, for instance, it is less subjectively 'reasonable' to search a man's house when he is arrested on his front lawn—or just down the street—than it is when he happens to be in the house at the time of arrest."

[9] At oral argument, the Government conceded that the agents' occupation of the apartment constituted a "continuing search" for exactly this reason. Transcript of Oral Arg. 27, 31.

[10] See *United States* v. *Karo*, *ante*, at ——; *United States* v. *Jacobsen*, 466 U. S. ——, —— (1984); *United States* v. *Place*, 462 U. S. —— (1983); *id.*, at —— (BRENNAN, J., concurring in the result); *Texas* v. *Brown*, 460 U. S. ——, —— (1983) (STEVENS, J., concurring in the judgment).

to their apartment were subject to meaningful governmental interference. The agents not only excluded petitioners from access to their own apartment, and thereby prevented them from exercising any possessory right at all to the apartment and its contents, but they also exercised complete dominion and control over the apartment and its contents.[11] Our cases virtually compel the conclusion that the contents of the apartment were seized. We have held that when the police take custody of a person, they concomittantly acquire lawful custody of his personal effects, see *Illinois* v. *Lafayette*, 462 U. S. ——, —— (1983); *United States* v. *Edwards*, 415 U. S. 800 (1975); *United States* v. *Robinson*, 414 U. S. 218 (1974); and when they take custody of a car, they are also in lawful custody of its contents, see *South Dakota* v. *Opperman*, 428 U. S. 364 (1976). Surely it follows that when the authorities take custody of an apartment they also take custody of its contents.[12]

This seizure was constitutionally unreasonable. Even a seizure reasonable at its inception can become unreasonable because of its duration. *United States* v. *Place*, 462 U. S. ——, —— (1983). Even if exigent circumstances justified the entry into and impoundment of the premises pending a warrant—and no one even argues that such circumstances existed—the duration of the seizure would nevertheless have been unreasonable. While exigent circumstances may justify police conduct that would otherwise be unreasonable

[11] While Segura was lawfully in custody during this period, Colon and her three companions were not. They were unknown to the agents prior to the illegal entry and, as the District Court noted, would have been able to remain in the apartment free from governmental interference had the unlawful entry not occurred.

[12] THE CHIEF JUSTICE's parsimonious approach to Fourth Amendment rights is vividly illustrated by the fact that, as though he were preparing an adversary's brief, he is unwilling even to acknowledge explicitly that the apartment and its contents were seized, but only "assumes" that was the case. *Ante*, at 9.

if undertaken without a warrant, such conduct must be "strictly circumscribed by the exigencies which justify its initiation," *Terry* v. *Ohio*, 392 U. S. 1, 25–26 (1968).[13] The cases THE CHIEF JUSTICE cites, *ante*, at 10–14, for the proposition that the Government may impound premises for the amount of time necessary to procure a warrant thus have no application to this case whatsoever.[14] There is no contention that a period of 18–20 hours was even remotely necessary to procure a warrant. The contrast between the 90 minute duration of the seizure of a piece of luggage held unreasonable in *Place* and the 18–20 hour duration of the seizure of the apartment and its contents in this case graphically illustrates the unreasonable character of the agents' conduct. Moreover, unlike *Place*, which involved a seizure lawful at its inception, this seizure was constitutionally unreasonable from the moment it began. It was conducted without a warrant and in the absence of exigent circumstances.[15] It has been clear since at least *Chimel* v. *California*, 395 U. S. 752

[13] See *Mincey* v. *Arizona*, 437 U. S. 385, 393 (1978); *G. M. Leasing Corp.* v. *United States*, 429 U. S. 338, 358–359 (1977); *Vale* v. *Louisiana*, 399 U. S. 30, 34–35 (1970); *Chimel* v. *California*, 395 U. S. 752, 762–763 (1969).

[14] THE CHIEF JUSTICE's misuse of *Place*, *ante*, at 17, n. 8, is quite remarkable. He suggests that *Place* approved the almost three-day detention of Place's luggage before a warrant was obtained, when in fact the Court had no occasion to reach that issue because it held that the initial 90-minute detenion of the luggage pending a "sniff test" using a trained narcotics-detecting dog was *unreasonable*. See 462 U. S., at ——. Other than this reference to *Place*, THE CHIEF JUSTICE's diligent search for support for his holding has produced nothing but dissenting opinions and a law review article. See *ante*, at 13–14, n. 7. Dean Griswold's article, however, did not even purport to answer the question presented by this case. See Griswold, Criminal Procedure, 1969—Is it a Means or an End?, 29 Md. L. Rev. 307, 317 (1969).

[15] Since these premises were impounded "from the inside," I assume impoundment would be permissible even absent exigent circumstances when it occurs "from the outside"—when the authorities merely seal off premises pending the issuance of a warrant but do not enter.

(1969), that the police may neither search nor seize the contents of a home without a warrant.[16] There is simply no basis for concluding that this 18–20 hour warrantless invasion of petitioners' home complied with the Fourth Amendment. Because the agents unreasonably delayed in seeking judicial authorization for their seizure of petitioners' apartment, that seizure was unreasonable.

Nevertheless, in what I can only characterize as an astonishing holding, THE CHIEF JUSTICE, joined by JUSTICE O'CONNOR, concludes that the 18–20 hour seizure of the apartment was not unreasonable. He advances three reasons for that conclusion, none of which has any merit.

First, he seeks to justify the delay because "the officers focused first on the task of processing those whom they had arrested before turning to the task of securing the warrant." *Ante*, at 16. But there is no evidence that this task presented any difficulties; indeed, since the arrest of the occupants itself was unconstitutional, it is truly ironic that THE CHIEF JUSTICE uses one wrong to justify another. Of greater significance, the District Court expressly found that the length of the delay was unreasonable and that the Government had made no attempt to justify it; that finding was upheld by the Court of Appeals and in this Court the Government expressly concedes that the delay was unreasonable.[17]

---

[16] See also *Steagald v. United States*, 451 U. S. 204 (1981); *Payton v. New York*, 445 U. S. 573 (1980); *Mincey v. Arizona*, 437 U. S. 385 (1978); *Vale v. Louisiana*, 399 U. S. 30 (1970). In fact, except for an aberrational warrantless "search incident to an arrest" exception recognized in *United States v. Rabinowitz*, 339 U. S. 56 (1950), and repudiated by *Chimel*, this rule has been settled since *Agnello v. United States*, 269 U. S. 20, 32–33 (1925). See also *Trupiano v. United States*, 334 U. S. 699 (1948).

[17] The only explanation the Government has offered for the delay is that most of February 13 was taken up with "processing" the arrests. Brief for the United States 5, n. 4. At oral argument, the Government conceded that the delay was unreasonable. Transcript of Oral Arg. 27. At the suppression hearing in the District Court, one of the agents testified that the warrant application was not even presented to a magistrate until 5:00 p. m.

Second, THE CHIEF JUSTICE suggests that it is relevant that the officers did not act in "bad faith." *Ante*, at 2, 16. This is done despite the fact that there is no finding as to whether the agents acted in good or bad faith; the reason is that the litigants have never raised the issue. More important, this Court has repeatedly held that a police officer's good or bad faith in undertaking a search or seizure is irrelevant to its constitutional reasonableness,[18] and does so again today.[19]

Finally, and "most important" to his conclusion, THE CHIEF JUSTICE suggests that there was no significant interference with petitioners' possessory interests in their apartment because they were in custody anyway. *Ante*, at 16–17. The cases are legion holding that a citizen retains a protected possessory interest in his home and the effects within it which may not be infringed without a warrant even though that person is in custody. *Mincey* and *Chimel* are but two instances of that general rule—the defendants in both cases were in custody, yet both were held to have protected possessory interests in their homes and the effects within them that could not be infringed without a warrant. Even when a person is in custody after an arrest based on probable cause, he still, of course, owns his house and his right to exclude others—including federal narcotics agents—remains inviolate. What is even more strange about THE CHIEF JUSTICE's conclusion is that it permits the authorities to benefit

---

on February 13. He explained: "Well, it's very hard to get secretarial services today." Tr. 162–163. The Assistant United States Attorney responsible for procuring the warrant testified similarly. Tr. 445. The attorney did not explain why he did not simply write out the two-page application by hand, or seek a telephonic warrant under Fed. Rule Crim. Proc. 41(c)(2). The District Court found that the delay was unreasonable, App. 15–16, a finding that the Court of Appeals did not disturb. The Government does not challenge that finding in this Court.

[18] See *Terry* v. *Ohio*, 392 U. S. 1, 22 (1968); *Beck* v. *Ohio*, 379 U. S. 87, 97 (1964); *Henry* v. *United States*, 361 U. S. 98, 102 (1961).

[19] *United States* v. *Leon*, *ante*, at 16, n. 13.

from the fact that they had unlawfully arrested Colon. Colon was in her own home when she was arrested without a warrant. That was unconstitutional.[20] If the agents had decided to obey the Constitution and not arrest Colon, then she would not have "relinquished control" over the property and presumably it would have been unreasonable for the agents to have remained on the premises under THE CHIEF JUSTICE's analysis. However, because the agents conducted an unlawful arrest in addition to their previous unlawful entry, an otherwise unreasonable occupation becomes "reasonable." THE CHIEF JUSTICE's approach is as reasonable as was the agents' conduct. Only in that sense does it achieve its purpose.

Thus, on the basis of the record evidence and the findings of the District Court, it is clear that the 18–20 hour occupation of petitioners' apartment was a second independent violation of the Fourth Amendment. Not only was it the fruit of the initial illegal entry into that apartment, but it also constituted an unreasonable search and seizure of the apartment. The District Court concluded that both violations should be remedied by suppression of all of the evidence found in the apartment. The Court of Appeals agreed that suppression of the prewarrant evidence was the proper remedy for the first violation but prescribed no remedy for the second. THE CHIEF JUSTICE does not agree that there was a second violation, and the Court concludes that the unconstitutional conduct that did occur was neutralized by the ultimate issuance of a valid warrant. In reaching that conclusion the Court correctly recognizes that the law requires suppression of the evidence if it was "come at by exploitation of [the initial] illegality" instead of "by means sufficiently distinguishable to be purged of the primary taint." *Ante*, at 8 (quoting *Wong Sun* v. *United States*, 371 U. S. 471, 484

---

[20] *Welsh* v. *Wisconsin*, 466 U. S. —— (1984); *Payton* v. *New York*, 445 U. S. 573 (1980).

(1963)). The Court fails, however, to discuss the reason for that rule or how it should apply to the facts of this case.

III

Every time a court holds that unconstitutionally obtained evidence may not be used in a criminal trial it is acutely aware of the social costs that such a holding entails.[21] Only the most compelling reason could justify the repeated imposition of such costs on society. That reason, of course, is to prevent violations of the Constitution from occurring.[22]

---

[21] Justice Holmes commented on this dilemma:

"We must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits. We have to choose, and for my part I think it a lesser evil that some criminals should escape than that the Government should play an ignoble part." *Olmstead* v. *United States*, 277 U. S. 438, 470 (1928) (dissenting opinion).

[22] Justice Stewart has written that

"the Framers did not intend the Bill of Rights to be no more than unenforceable guiding principles—no more than a code of ethics under an honor system. The proscriptions and guarantees in the amendments were intended to create legal rights and duties.

"The Bill of Rights is but one component of our legal system—the one that limits the government's reach. The primary responsibility for enforcing the Constitution's limits on government, at least since the time of *Marbury* v. *Madison*, has been vested in the judicial branch. In general, when law enforcement officials violate a person's Fourth Amendment rights, they do so in attempting to obtain evidence for use in criminal proceedings. To give effect to the Constitution's prohibition against illegal searches and seizures, it may be necessary for the judiciary to remove the incentive for violating it. Thus, it may be argued that although the Constitution does not explicitly provide for exclusion, the need to enforce the Constitution's limits on government—to preserve the rule of law—requires an exclusionary rule." Stewart, The Road to *Mapp* v. *Ohio* and Beyond:

As the Court has repeatedly stated, a principal purpose of the exclusionary rule is to deter violations of the Fourth Amendment. See, *e. g.*, *Stone* v. *Powell*, 428 U. S. 465, 486 (1976); *United States* v. *Janis*, 428 U. S. 433, 446–447 (1976); *United States* v. *Peltier*, 422 U. S. 531, 536–539 (1975); *United States* v. *Calandra*, 414 U. S. 338, 347–348 (1974).

> "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U. S. 206, 217 (1960).

The deterrence rationale for the exclusionary rule sometimes, but not always, requires that it be applied to the indirect consequences of a constitutional violation. If the Government could utilize evidence obtained through exploitation of illegal conduct, it would retain an incentive to engage in that conduct. "To forbid the direct use of methods thus characterized [as illegal] but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.'" *Nardone* v. *United States*, 308 U. S. 338, 340 (1939).

We have not, however, mechanically applied the rule to every item of evidence that has a causal connection with police misconduct. "The notion of 'dissipation of the taint' attempts to mark the point at which the detrimental consequences of illegal police conduct become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost." *Brown* v. *Illinois*, 422 U. S. 590, 609 (1975) (POWELL, J., concurring in part).[23]

The Origins, Development and Future of the Exclusionary Rule, 83 Colum. L. Rev. 1365, 1383–1384 (1983).

[23] See 3 W. LaFave, Search and Seizure § 11.4(a) (1978); Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U. Pa. L. Rev. 378, 388–390 (1964); Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 Calif. L. Rev. 579, 586–589 (1968).

This point is well illustrated by our cases concerning the use of confessions obtained as the result of unlawful arrests. In *Wong Sun* v. *United States*, 371 U. S. 471 (1963), we rejected a rule that any evidence that would not have been obtained but for the illegal actions of the police should be suppressed. See *id.*, at 487–488, 491. Yet in *Brown* v. *Illinois*, 422 U. S. 590 (1975), while continuing to reject a "but-for" rule, see *id.*, at 603, we held that the taint of an unlawful arrest could not be purged merely by warning the arrestee of his right to remain silent and to consult with counsel as required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966). We explained:

> "If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. Arrests made without warrant or without probable cause, for questioning or 'investigation,' would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a 'cure-all,' and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to 'a form of words.'" 422 U. S., at 602–603 (citation and footnote omitted).

These holdings make it clear that taint questions do not depend merely on questions of causation; causation is a necessary but not a sufficient condition for exclusion. In addition, it must be shown that exclusion is required to remove the incentive for the police to engage in the unlawful conduct. When it is, exclusion is mandated if the Fourth Amendment is to be more than "a form of words."

IV

The Court concludes that the evidence introduced against petitioners at trial was obtained from a source that was "independent" of the prior illegality—the search warrant. The Court explains that since the police had a legal basis for obtaining and executing the search warrant, the fruits of the authorized search were not produced by exploitation of the prior illegality. *Ante*, at 17–18. There are significant analytical difficulties lurking in the Court's approach. First, the Court accepts the distinction between the evidence obtained pursuant to the warrant and the evidence obtained during the initial illegal entry. *Ante*, at 17–18; see also *ante*, at 15 (opinion of BURGER, C. J.). I would not draw a distinction between the pre-warrant evidence and the post-warrant evidence. The warrant embraced both categories equally and if there had been no unlawful entry, there is no more reason to believe that the evidence in plain view would have remained in the apartment and would have been obtained when the warrant was executed than the evidence that was concealed. The warrant provided an "independent" justification for seizing all the evidence in the apartment—that in plain view just as much as the items that were concealed. The "plain view" items were not actually removed from the apartment until the warrant was executed;[24] thus there was no more interference with petitioners' possessory interest in those items than with their interest in the concealed items. If the execution of a valid warrant takes the poison out of the hidden fruit, I should think that it would also remove the taint from the fruit in plain view.[25]

---

[24] Tr. 259.

[25] I recognize that the legality of the seizure of the evidence that was in plain view when the officers entered is not before us, but I find it necessary to discuss it since it affects the analysis of the issue that is in dispute. THE CHIEF JUSTICE does so as well; he relies on the deterrent effect of the suppression of the evidence found in plain view in responding to petitioners'

Second, the Court's holding is inadequate to resolve the claims raised by petitioners. The Court states that the fruits of the judicially authorized search were untainted because "[n]o information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant." *Ante*, at 17. That is sufficient to dispose only of a claim that petitioners do not make—that the information which led to the issuance of the search warrant was tainted. It does not dispose of the claim that petitioners do make—that the agents' *access* to the fruits of the authorized search, rather than the *information* which led to that search, was a product of illegal conduct. On this question, the length of the delay in obtaining the warrant is surely relevant.

If Segura had not returned home at all that night, or during the next day, it is probable that the occupants of the apartment would have become concerned and might at least have destroyed the records of their illegal transactions, or removed some of the evidence. If one of the occupants had left the apartment and taken evidence with him or her during the 18–20 hour period prior to the execution of the search warrant, then obviously that evidence would not have been accessible to the agents when the warrant finally was executed.[26] The District Court concluded that there was a possibility that the evidence's availablilty when the warrant was executed hinged solely on the illegal impoundment. It found: "The evidence would not inevitably have been discov-

argument that the Court of Appeals' decision will encourage illegal entries in the course of securing premises from the inside. *Ante*, at 15.

[26] It is by no means impossible that at least one of the occupants might have been able to leave the apartment. None of them was known to the agents, and if the agents were located outside the apartment building, they would not have known that a person leaving the building would have come from petitioners' apartment. There were quite a few apartments on each floor of the apartment building. Tr. 253. Moreover, as the District Court noted, the agents could not see petitioners' apartment from their position in the front of the building.

ered. In fact, Colon might well have destroyed the evidence had she not been illegally excluded [from the apartment]." App. 15. This finding indicates that there is substantial doubt as to whether all of the evidence that was actually seized would have been discovered if there had been no illegal entry and occupation.

The majority insists that the idea that access to evidence is a relevant consideration is "unsound" because it would "extend" the exclusionary rule and "further 'protect' criminal activity," *ante*, at 19. However, this very point is far from novel; it actually has been the long-settled rule. It is implicit in virtually every case in which we have applied the exclusionary rule. In the seminal case, *Weeks* v. *United States*, 232 U. S. 383 (1914), federal agents illegally entered Weeks' house and seized evidence. The Court ordered the evidence suppressed precisely because absent the illegality, the agents would never have obtained access to the evidence. See *id.*, at 393–394. More recently, in *Payton* v. *New York*, 445 U. S. 573 (1980), we held that suppression was required because the agents were not authorized to enter the house; it was the Fourth Amendment violation that enabled them to obtain access to the evidence. Indeed, we have regularly invoked the exclusionary rule because the evidence would have eluded the police absent the illegality.[27] Here, too, if the evidence would not have been available to the agents at the time they finally executed the warrant had they not illegally entered and impounded petitioners' apartment, then it cannot

[27] The element of access, rather than information, is central to virtually the whole of our jurisprudence under the Warrant Clause of the Fourth Amendment. In all of our cases suppressing evidence because it was obtained pursuant to a warrantless search, we have focused not on the authorities' lack of appropriate information to authorize the search, but rather on the fact that that information was not presented to a magistrate. Thus, suppression is the consequence not of a lack of information, but of the fact that the authorities' access to the evidence in question was not properly authorized and hence was unconstitutional.

be said that the agents' access to the evidence was "independent" of the prior illegality.

The unlawful delay provides the same justification for suppression as does the unlawful entry: both violations precluded the possibility that evidence would have been moved out of the reach of the agents. We approved of exactly that principle only last Term, in *United States* v. *Place*, 462 U. S. —— (1983). There, luggage was detained for some 90 minutes until a trained narcotics detection dog arrived. The dog then sniffed the luggage, signaled the presence of narcotics, a warrant was obtained on the strength of the dog's reaction, and when the warrant was executed, narcotics were discovered. The Court held that while the initial seizure was lawful, it became unreasonable because of its duration. Thus, absent the illegality, the authorities would have had to give the luggage back to Place, who would have then taken it away.[28] *The evidence was obtained in violation of the Fourth Amendment because it was the unlawful delay that prevented the evidence from disappearing before it could be obtained by the authorities.* That is precisely the claim made by petitioners here.

When it finally does confront petitioners' claim concerning the relationship between the unlawful occupation of their apartment and the evidence obtained at the conclusion of that occupation, *ante*, at 19–20, the Court rejects it for two reasons. First, it finds the possibility that the evidence would not have been in the apartment had it not been impounded to be speculative. However, the District Court found a distinct, nonspeculative possibility that the evidence would not have been available to the police had they not entered the

[28] Even more recently, in *Welsh* v. *Wisconsin*, 466 U. S. —— (1984), we again employed this concept. The Court held that police could not justify under the Fourth Amendment the warrantless arrest of Welsh, who was suspected of drunk driving, in his own home, "simply because the evidence might have dissipated while the police obtained a warrant." *Id.*, at —— (footnote omitted).

apartment illegally. The Court is obligated to respect that finding unless found to be clearly erroneous, which it is not. Indeed, it is equally speculative to assume that the occupants of the apartment would not have become concerned enough to take some action had Segura been missing for 18–20 hours.[29] Second, the Court thinks it "prudentially unsound" to suppress the evidence, noting a certain irony in extending the protection of the Constitution simply because criminals may destroy evidence if given the chance. This analysis confuses two separate issues however, (1) whether the initial entry was justified by exigent circumstances; and (2) whether the discovery of the evidence can be characterized as "inevitable" notwithstanding the 18 hour delay. There is no dispute that the risk of *immediate* destruction did not justify the entry. The argument petitioners make is not that there was some immediate threat of destruction of evidence, but that there was a substantial possibility that over the course of

[29] The Court of Appeals, with which this Court agrees, noted that the District Court's ruling depended on "speculative assumptions," such as that the agents would not have kept the apartment under surveillance after Segura's arrest had they not illegally entered it, that Colon would have destroyed the evidence rather than merely removed it from the apartment, or that the evidence could have been destroyed unobtrusively. However, each of these "assumptions" is supported by the evidence. First, the agents would have had no reason to keep the apartment under surveillance subsequent to the arrests of all the persons that they had surveilled, Parra, Rivadulla and Segura. Second, even if Colon had merely removed the evidence from the apartment, there is reason to believe the agents would not have intercepted her. See n. 26, *supra*. Third, since the agents were outside the apartment and would have had no reason to remain on the scene after Segura's arrest, they would not have been around to notice had evidence been removed or destroyed unobtrusively. Moreover, even if it would have been difficult to remove or destroy some of the evidence, such as the triple-beam scale petitioners owned, that does not mean that all of the evidence would have remained in the apartment over the course of an 18–20 hour period. The Court of Appeals' assumptions to the contrary are just as "speculative" as the finding of the District Court.

18–20 hours at least some of the evidence would have been removed or destroyed.[30]

For me, however, the controlling question should not be answered merely on the basis of such speculation, but rather by asking whether the deterrent purposes of the exclusionary rule would be served or undermined by suppression of this evidence. That is the appropriate "prudential" consideration identified in our exclusionary rule cases. The District Court found that there was a distinct possibility that the evidence was preserved only through an illegal occupation of petitioners' apartment. That possibility provides a sufficient reason for asking whether the deterrent rationale of the exclusionary rule is applicable to the second constitutional violation committed by the police in this case.

V

The importance of applying the exclusionary rule to the police conduct in this case is underscored by its facts. The 18–20 hour occupation of petitioners' home was blatantly unconstitutional. At the same time, the law-enforcement justification for engaging in such conduct is exceedingly weak. There can be no justification for inordinate delay in securing a warrant. Thus, applying the exclusionary rule to such conduct would impair no legitimate interest in law enforcement.

[30] The cases in the lower courts the majority cites in support of its holding, *ante*, at 18, n. 9, are plainly distinguishable. In *United States* v. *Perez*, 700 F. 2d 1232, 1237–1238 (CA8 1983), the court remanded for a hearing as to whether the search and seizure authorized by a warrant was tainted by prior illegality. In *United States* v. *Kinney*, 638 F. 2d 941, 945 (CA6), cert. denied, 452 U. S. 918 (1981), the court found no taint, but in that case there was no occupation of the searched premises prior to obtaining the warrant and hence no claim of the type made here. The same is true of the other cases the Court cites, *United States* v. *Bosby*, 675 F. 2d 1174, 1180–1181 (CA11 1982); *United States* v. *Fitzharris*, 633 F. 2d 416 (CA5 1980), cert. denied, 452 U. S. 918 (1981); *United States* v. *Agapito*, 620 F. 2d 324. 338 (CA2), cert. denied, 449 U. S. 834 (1980). As the Court concedes, *United States* v. *Lomas*, 706 F. 2d 886 (CA9 1983), and *United States* v. *Allard*, 634 F. 2d 1182 (CA9 1980), are contrary to its holding.

Moreover, the deterrence rationale of the rule is plainly applicable. The agents impounded this apartment precisely because they wished to avoid risking a loss of access to the evidence within it. Thus, the unlawful benefit they acquired through the impoundment was not so "attenuated" as to make it unlikely that the deprivation of that benefit through the exclusionary rule would have a deterrent effect. To the contrary, it was exactly the benefit identified by the District Court—avoiding a risk of loss of evidence—that motivated the agents in this case to violate the Constitution. Thus, the policies underlying the exclusionary rule demand that some deterrent be created to this kind of unconstitutional conduct. Yet the majority's disposition of this case creates none. Under the majority's approach, the agents could have remained indefinitely—impounding the apartment for a week or a month—without being deprived of the advantage derived from the unlawful impoundment. We cannot expect such an approach to prevent similar violations of the Fourth Amendment in the future.

In my opinion the exclusionary rule should be applied to both of the constitutional violations to deprive the authorities of the advantage they gained as a result of their unconstitutional entry and impoundment of petitioners' apartment. The deterrence rationale of the exclusionary rule requires suppression unless the Government can prove that the evidence in fact would have remained in the apartment had it not been unlawfully impounded. The risk of uncertainty as to what would have happened absent the illegal conduct posed by the facts of this case should be borne by the party that created that uncertainty, the Government. That is the teaching of our exclusionary rule cases. See *Taylor* v. *Alabama*, 457 U. S. 687, 690 (1982); *Dunaway* v. *New York*, 442 U. S. 200, 218 (1979); *Brown* v. *Illinois*, 422 U. S. 590, 604 (1975).

Further proceedings are necessary in this case if petitioners' claim is to be properly evaluated. The District Court

found only that there was a demonstrable possiblity that the evidence obtained during the execution of the search warrant would have been destroyed absent the illegal entry and impoundment. While this finding is sufficient to establish prima facie that the Government exploited the illegality by avoiding a risk of losing the evidence in the apartment, the existence of a mere possibility cannot be equated with an ultimate finding that such exploitation did in fact occur. The District Court made no specific finding as to whether the Government had demonstrated that the evidence obtained pursuant to the search warrant would have remained in the apartment had the agents not illegally entered and impounded it. It may be that an evidentiary hearing would be necessary to supplement the record on this point. Accordingly, I would remand this case to the Court of Appeals with instructions that it be remanded to the District Court for further proceedings.

VI

The Government did not contest the blatant unconstitutionality of the agents' conduct in this case. Nevertheless, today's holding permits federal agents to benefit from that conduct by avoiding the risk that evidence would be unavailable when the search warrant was finally executed. The majority's invocation of the "enormous price" of the exclusionary rule and its stated unwillingess to "protect criminal activity," *ante*, at 19, is the most persuasive support that the Court provides for its holding. Of course, the Court is quite right to be ever mindful of the cost of excessive attention to procedural safeguards. But an evenhanded approach to difficult cases like this requires attention to countervailing considerations as well. There are two that I would stress.

First, we should consider the impact of the Court's holding on the leaders of the law enforcement community who have achieved great success in creating the kind of trained, professional officers who deservedly command the respect of the communities they serve. The image of the "keystone cop"

whose skills seldom transcended the ham-handed employment of the "third degree" is largely a matter of memory for those of us who lived through the 1920s, 1930s and 1940s. For a congery of reasons, among which unquestionably is the added respect for the constitutional rights of the individual engendered by cases like *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and *Mapp* v. *Ohio*, 367 U. S. 643 (1961), the professionalism that has always characterized the Federal Bureau of Investigation is now typical of police forces throughout the land. A rule of law that is predicated on the absurd notion that a police officer does not have the skill required to obtain a valid search warrant in less than 18 or 20 hours, or that fails to deter the authorities from delaying unreasonably their attempt to obtain a warrant after they have entered a home, is demeaning to law enforcement and can only encourage sloppy, undisciplined procedures.

Second, the Court's rhetoric cannot disguise the fact that when it not only tolerates, but provides an affirmative incentive for warrantless and plainly unreasonable and unnecessary intrusions into the home, the resulting erosion of the sanctity of the home is a "price" paid by the innocent and guilty alike.[31] More than half a century ago, Justice Holmes

---

[31] The words of Justice Jackson that this case calls to my mind are not those of his *Nardone* dissent, *ante*, at 20, but rather those in two of his other dissents. With respect to the claim that the Fourth Amendment "protect[s] criminal activity," he wrote: "Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. . . . Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty. . . . So a search against Brinegar's car must be regarded as a search of the car of Everyman." *Brinegar* v. *United States*, 338 U. S. 160, 181 (1949). And with respect to the "price" exacted by the exclusionary rule, he wrote: "[T]he forefathers thought this was not too great a price to pay for that decent privacy of home, papers and effects which is indispensible to individual dignity and self-respect. They may have overvalued privacy, but

explained why the Government cannot be permitted to benefit from its violations of the Constitution.

> "The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had.
>
> "The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage the Government now regrets, . . . the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act . . . . In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 391–392 (1920) (citation omitted).

If we are to give more than lip service to protection of the core constitutional interests that were twice violated in this case, some effort must be made to isolate and then remove the advantages the Government derived from its illegal conduct.

I respectfully dissent.

I am not disposed to set their command at naught." *Harris* v. *United States*, 331 U. S. 145, 198 (1947).